Supreme Court, U.S.
FILED
09-664 DEC 7 - 2009
OFFICE OF THE CLERK

No. 09-____

In the Supreme Court of the United States

LUIS ENRIQUE ARAMBULA-MEDINA,
Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 2009

QUESTION PRESENTED

Whether the courts of appeals have jurisdiction to review "streamlining" decisions made by members of the Board of Immigration Appeals pursuant to 8 C.F.R. § 1003.1(e).

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PETITION FOR A WRIT OF CERTIORARI

Luis Enrique Arambula-Medina respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 572 F.3d 824 (10th Cir. 2009) and reprinted as Appendix A, Pet. App. 1a–9a. The court of appeals dismissed for want of jurisdiction Mr. Arambula-Medina's petition to review the decision of the Board of Immigration Appeals ("BIA"), which challenged, *inter alia*, a single BIA member's decision to affirm, without opinion, the decision of the Immigration Judge. *See* Appendix B, Pet. App. 10a–11a. The Immigration Judge's denial of petitioner's cancellation-of-removal request, dated November 15, 2007, is reprinted as Appendix C, Pet. App. 12a–44a.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Tenth Circuit entered its judgment and opinion on July 10, 2009. Justice Sotomayor granted petitioner's application to extend the time to file a petition for a writ of certiorari through and including December 7, 2009. Supreme Court Dkt. No. 09A315. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant portions of the Administrative Procedure Act, the Immigration and Naturalization Act,

and the Code of Federal Regulations are reproduced as Appendix D.

STATEMENT OF THE CASE

1. Petitioner Luis Arambula-Martinez is a 23-year-old native and citizen of Mexico. Pet. App. 12a–13a. He entered the United States in December 1991, at the age of six, and has lived in this country ever since. Pet. App. 13a. He remains extremely close with his younger, permanent resident siblings, Anthony (age 10) and Edwin (age 9). Pet. App. 16a–17a. Petitioner cannot read or write Spanish, and he failed the subject in high school. Pet. App. 18a. Petitioner also is extremely close to his mother, who relies on him to help care for her younger children. Pet. App. 16a, 24a.

In 2006, the Department of Homeland Security charged Mr. Arambula-Martinez with being subject to removal from the United States. Pet. App. 2a. Mr. Arambula-Medina admitted his removability but applied for cancellation of removal under 8 U.S.C. § 1229b(b), which authorizes the Attorney General to cancel removal of an alien in certain circumstances. Pet. App. 3a–4a; *see also* 8 U.S.C. § 1229b(b).

Mr. Arambula-Medina's application was reviewed by an Immigration Judge ("IJ"). Through a written decision issued November 15, 2007, the IJ rejected Mr. Arambula-Medina's cancellation request. Pet. App. 12a–44a. The IJ agreed that Mr. Arambula-Medina satisfied three of the statutory requirements for cancellation of removal: he has been present in the United States for a continuous period of not less than ten years, Pet. App. 28a, he has been a person of good moral character during that time,

Pet. App. 28a–31a, and he has never been convicted of a relevant criminal offense, Pet. App. 31a. With respect to the final cancellation factor, however, the IJ concluded that Mr. Arambula-Medina's "qualifying relatives would not suffer hardship 'substantially beyond that which would ordinarily be expected to result from the respondent's deportation.'" Pet. App. 32a–33a (quoting *In re Monreal*, 23 I&N Dec. 56, 56 (BIA 2001)); *see also* 8 U.S.C. § 1229b(b)(1)(D). As a result, the IJ denied Mr. Arambula-Medina's application for cancellation of removal. Pet. App. 42a. Mr. Arambula-Medina appealed the IJ's decision to the Board of Immigration Appeals ("BIA").

2. Prior to 1999, all such appeals were decided by panels of three BIA members. Under "streamlining" regulations promulgated in 1999 and 2002, however, most appeals are now resolved by less than a full BIA panel. Rather, all cases are first assigned to a single BIA member responsible for determining, under 8 C.F.R. § 1003.1(e)(6), whether the case must be referred to a full three-member panel. *See* 8 C.F.R. § 1003.1(e)(3) ("A single Board member assigned under the case management system shall determine the appeal on the merits . . . unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section."); *see also* § 1003.1(e)(1) ("Unless a case meets the standards for assignment to a three-member panel . . . all cases shall be assigned to a single Board member for disposition."). Subsection (e)(6), in turn, sets forth a variety of circumstances that require full panel review, including but not limited to the need to settle inconsistencies among the rulings of different IJs, *see* § 1003.1(e)(6)(i); the need to review

an IJ decision that is not in conformity with applicable law or precedents, *see* § 1003.1(e)(6)(iii); the need to review an IJ's clearly erroneous factual determination, *see* § 1003.1(e)(6)(v); and, in most circumstances, the need to reverse an IJ's decision, *see* § 1003.1(e)(6)(vi).

In cases where the subsection (e)(6) factors are not met, the single BIA member must dispose of the appeal on his or her own. The regulations provide only two ways to do so. First, in limited circumstances, the BIA member must instead summarily affirm the IJ's decision. *See* § 1003.1(e)(4). Subsection (e)(4) requires affirmance without opinion whenever the IJ's decision was "correct" and the issues on appeal are "squarely controlled by existing precedent" or "not so substantial" to warrant a written opinion. *See id.* Second, in cases where affirmance without opinion is not required, the BIA member must instead issue a brief order resolving the appeal under Section 1003.1(e)(5). *See also* §§ 1003.1(e)(1), (e)(3). Under this framework, a single BIA member has almost no authority to reverse an IJ's decision. *See* §§ 1003.1(e)(4), (e)(5). Rather, he or she may only reverse when doing so is "plainly . . . required by intervening" law, such as a BIA decision, an act of Congress, or a regulation. *See* § 1003.1(e)(5).

Once a single BIA member affirms an IJ's decision to deny cancellation of removal, appellants cannot challenge the underlying merits of that discretionary decision. *See* 8 U.S.C. § 1252(a)(2)(B)(i) (stating that no court has jurisdiction to review any judgment regarding the granting of relief under Section 1229b); *Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1261–1262 (10th Cir. 2003) (stating that can-

cellation-of-removal hardship determination is an unreviewable discretionary decision under Section 1252(a)(2)(B)(i)). As a practical matter, therefore, applicants such as Mr. Arambula-Medina cannot prevail on appeal unless the first survive the streamlining process and have their cases heard by a three-member BIA panel.

3. In petitioner's case, a single BIA member resolved his appeal by issuing an affirmance without opinion under subsection (e)(4), *see* Pet. App. 6a, even though petitioner had expressly requested full panel review under subsection (e)(6), *see* Pet. App. 9a. Mr. Arambula-Medina's appellate brief argued that full panel review was required under subsection (e)(6) because there was a complete absence of "squarely controll[ing]" precedent covering cancellation of removal for immigrants in petitioner's position, a child whose parents are reliant upon him. *See* Appellant's 10th Cir. Br. at 36–37. Petitioner's case is thus strikingly different from the only three precedents on cancellation of removal, as *In re Monreal*, 23 I&N Dec. 56 (BIA 2001), *In re Andazola*, 23 I&N Dec. 319 (BIA 2002), and *In re Recinas*, 23 I&N Dec. 467 (BIA 2002), each deal with petitioners who were the *parents* of permanent resident *children*. *See* Pet. App. 32a–35a.[1] Nevertheless, the single BIA member affirmed the IJ's findings without opinion, rather

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[1] At best, Mr. Arambula-Medina's situation resembles that of the children of the petitioner in *Recinas*—both of whom received lawful permanent resident status upon their mother's successful appeal seeking such status for herself. 23 I&N Dec. 467, 473 (BIA 2002).

than referring the case to a three-member panel. Pet. App. 6a.

4. Mr. Arambula-Medina petitioned to the United States Court of Appeals for the Tenth Circuit, as provided for by 8 U.S.C. § 1252(b). He argued, *inter alia*, that the BIA member violated Section 1003.1(e)(6) by refusing to refer his case to a three-member panel and Section 1003.1(e)(4) by affirming the case without opinion.

The Tenth Circuit, in a precedential opinion, rejected Mr. Arambula-Medina's petition. Pet. App. 1a–9a. With respect to the streamlining issue, the court simply stated that the process "of having a single member affirm, without opinion, the IJ's decision, is clearly authorized by regulation." Pet. App. 9a. In reaching this conclusory holding, the Court invoked the general proposition that "[a]n alien has no constitutional right to any administrative appeal at all," Pet. App. 9a, citing *Yuk v. Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004), in order to undermine petitioner's demand for a procedurally-proper review of his cancellation-of-removal request. As a result, the Tenth Circuit dismissed Petitioner's appeal for lack of jurisdiction under 8 U.S.C. § 1252(a)(2)(D). Pet. App. 9a.

REASONS FOR GRANTING THE PETITION

In every BIA appeal, streamlining regulations require a single member of the Board to first determine whether, according to a series of defined criteria, the appeal must be referred to a three-member panel for detailed review, affirmed without opinion, or resolved through a new opinion by the single BIA member. Although these regulations were originally

justified as necessary to help the BIA address a substantial backlog of appeals, and appeared to achieve that goal, this ostensible success has masked deep structural problems—rapid case handling has come at the expense of consistent, fair decisionmaking. As a result, it is unsurprising that immigration petitioners across the United States, along with courts and commentators, have questioned whether BIA members are, through their hasty and unfounded use of the streamlining process, violating the very regulations that created the regime.

In response to these challenges, the courts of appeals have fractured, adopting three different approaches. Several circuits have held categorically that the federal courts may review whether a BIA member's decision to affirm without opinion complied with the regulatory criteria, finding the question within the jurisdiction of the federal courts. By contrast, others have categorically rejected jurisdiction over any such claims, holding that streamlining decisions are committed to agency discretion by law. A third group has charted a middle course, finding jurisdiction to review compliance with the streamlining regulations exists *only* in cases where the court of appeals also has jurisdiction to review the merits of the streamlined decision. The decision below exacerbates the tripartite conflict on this precise issue, demonstrating the critical need for this Court's review.

The availability of judicial review of a BIA member's decision to affirm without opinion is of critical importance to participants in the immigration appeals process, many of whom have no other means to ensure that the BIA's focus on swift resolution does

not deny them fair and effective review of their administrative appeals. The question is equally important to the administration of the federal circuit courts, which are buried under the avalanche of appeals that followed the adoption of the streamlining regulations. Finally, the decision below is simply wrong on the merits, contradicting both statutory text and the Court's precedents concerning the scope of judicial review over agency decisionmaking. This court should grant the petition, issue a writ of certiorari to the Tenth Circuit, and reverse the decision below.

I. The Decision Below Deepens a Mature Circuit Split Regarding the Availability of Judicial Review Over a BIA Member's Decision to Affirm Without Opinion.

Whether the courts of appeals may review a BIA member's decision to affirm without opinion under 8 C.F.R. § 1003.1(e)(4) turns on whether such review is authorized by the Administrative Procedure Act ("APA"). The APA broadly provides for judicial review of agency action. *See* 5 U.S.C. §§ 702, 706. Indeed, this Court has read the APA as "embodying a 'basic presumption of judicial review.'" *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967)). Nonetheless, the APA also includes a narrow exception forbidding review of decisions "committed to agency discretion by law." *See* 5 U.S.C. § 701(a)(2). As this Court explained, "'review is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of dis-

cretion.'" *See Lincoln*, 508 U.S. at 191 (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)).

Applying these standards to a BIA member's decision to affirm without opinion under 8 C.F.R. § 1003.1(e)(4), the courts of appeals have divided over a simple question: is a determination under subsection (e)(4) on of those "rare" decisions "committed to agency discretion by law?" With the circuits having reached every possible answer to the question presented—"yes," "no," and "maybe"—the result is an indisputable split that only this Court can resolve.

A. Several Circuits Have Categorically Found Jurisdiction to Review BIA Decisions to Affirm Without Opinion.

In direct conflict with the decision below, several circuits have categorically exercised jurisdiction to review BIA decisions to affirm an appeal without opinion, without reference to whether the court also possessed jurisdiction over the substantive merits of the affirmed decision. In the view of these circuits, 8 C.F.R. § 1003.1(e)(4)'s factors are mandatory, not discretionary, and therefore are subject to ordinary judicial review under the APA.

1. *Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004), provides the clearest and most comprehensive explanation why the federal courts have jurisdiction to review the BIA's application of the streamlining regulations. After first invoking the APA's requirement that agency determinations are reviewable unless "agency action is committed to agency discretion by law," the Third Circuit held that the APA provides jurisdiction to review the BIA's application of 8 C.F.R. § 1003.1(e)(4). *Smriko*, 387 F.3d at 291.

According to the *Smriko* panel, subsection (e)(4)'s criteria for when affirmance without opinion is appropriate "are clearly intended to require the single BIA member to determine whether the correct outcome was reached and, if so, whether a Board opinion would have significant value in the context of an appeal of the matter or in the context of other matters yet to be adjudicated." *Smriko*, 387 F.3d at 292. Unlike a typical discretionary agency decision, the streamlining criteria "have nothing to do with the BIA's caseload or other internal circumstances," but present "the kinds of issues [courts] routinely consider in reviewing cases." *Smriko* 387 F.3d at 292 (quoting *Batalova v. Ashcroft*, 355 F.3d 1246, 1253 (10th Cir. 2004)). As such, the criteria provide "sufficient law" for courts to apply, making streamlining decisions under (e)(4) appropriate for appellate review.

2. Through more limited holdings, the First and Ninth Circuits have each also adopted, at minimum, the core holding of the *Smriko* approach: that streamlining decisions are not "committed to agency discretion" under the APA.

In *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003), the First Circuit expressly rejected the government's argument that streamlining decisions were committed to the BIA's discretion under the APA, concluding that "the Board's own regulation provides more than enough 'law' by which a court could review the Board's decision to streamline." 350 F.3d at 206. Although later panels have questioned the scope of *Haoud*'s holding, the First Circuit recently confirmed the court's view that it has "jurisdiction to review the BIA's decision to streamline," at

least in certain cases, notwithstanding the APA. *See Hoxha v. Gonzales*, 446 F.3d 210, 220–221 (1st Cir. 2009).

Similarly, in *Chen v. Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004), the Ninth Circuit concluded that it has categorical jurisdiction to review application of at least *some* of subsection (e)(4)'s streamlining factors: whether "the issue on appeal is squarely controlled by existing Board or federal court precedent and does not involve the application of precedent to a novel fact situation" and whether the questions raised on appeal are sufficiently "insubstantial." As such, the Ninth Circuit has held that it categorically has jurisdiction to review certain elements of streamlining decisions.

3. This approach is also implicitly supported by holdings in the Fifth, Sixth, and Seventh Circuits. Although all three circuits claim to have left the question open, they have each nevertheless asserted jurisdiction to review decisions to affirm without opinion.

For example, in *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004), the Fifth Circuit recognized that it had found jurisdiction to review a BIA member's application of subsection (e)(4) in several persuasive yet non-precedential decisions, but had not yet had the occasion to decide the issue in a published case. *See* 382 F.3d at 525–527 (citing *Dika v. Ashcroft*, 85 Fed. Appx. 374 (5th Cir. 2004); *Turribiartes-Vitales v. Ashcroft*, 75 Fed. Appx. 312 (5th Cir. 2004); *Patel v. Ashcroft*, 71 Fed. Appx. 306 (5th Cir. 2003) (reviewing decision under predecessor to subsection (e)(4)). Nevertheless, regardless of whether such decisions are actually non-precedential, *see Anastasoff v.*

United States, 223 F.3d 898 (8th Cir. 2000), *vacated en banc as moot*, No. 99-3917, 2000 U.S. App. LEXIS 33247 (8th Cir. Dec. 18, 2000), the Fifth Circuit has nevertheless repeatedly exercised jurisdiction to review a BIA member's alleged non-compliance with subsection (e)(4)'s terms, without any suggestion that such jurisdiction was conditioned upon the court's ability to review any other aspect of the case.

The Sixth and Seventh Circuits have also exercised jurisdiction to review application of subsection (e)(4)'s regulatory predecessor, which had identical criteria. In *Denko v. INS*, rather than directly discussing the jurisdictional issue, the Sixth Circuit "assum[ed] without deciding" that such jurisdiction exists. *See Denko*, 351 F.3d 717, 731–732 (6th Cir. 2003); *see also Hassan v. Gonzales*, 403 F.3d at 437–438. Similarly, in *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003), the Seventh Circuit declined to "explicitly decid[e]" whether the streamlining decisions were subject to judicial review but carried on as though jurisdiction were established. *Id.* Of course, a court of appeals may not "assume" jurisdiction exists in order to review the merits of a case. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (quoting *Ex parte McCardle*, 74 U.S. 506 (1869)). ("'Without jurisdiction the court cannot proceed at all in any cause;' it may not assume jurisdiction for the purpose of deciding the merits of the case."). The Sixth and Seventh Circuits' decisions therefore provide at least tacit support for the position that streamlining determinations are properly subject to judicial review.

B. The Second and Eighth Circuits Have Refused to Review Decisions Under Subsection (e)(4), Claiming That Such Decisions Are "Committed to Agency Discretion Under Law."

Just as some courts have found that they *always* have jurisdiction to review subsection (e)(4) determinations, some circuits have found that that they *never* have jurisdiction to do so. In the view of the Second and Eighth Circuits, the streamlining regulations vest the BIA with complete and unreviewable discretion regarding whether to affirm without an opinion, barring judicial review under 5 U.S.C. § 701(a)(2).

1. In *Kambolli v. Gonzales*, 449 F.3d 454 (2d Cir. 2006), the Second Circuit held that streamlining decisions are entirely committed to agency discretion. The court based this holding upon the fact that "a Board member acting pursuant to 8 C.F.R § 1003.1(e)(4) is prohibited from making any record whatsoever of his reasoning when deciding to act alone and affirm an IJ's decision without opinion." *Id.* at 461. As a result, "a reviewing court therefore has no knowledge—and can have no knowledge—of the decision-making process of the BIA member," which militates against judicial review. *Id.* at 462. The Second Circuit then asserted that courts lack the "expertise necessary to evaluate" whether a case is appropriate for affirmance without opinion. *Id.* at 464 It accordingly held that courts always lack jurisdiction to review application of the streamlining regulations. *Id.* at 465.

2. The Eighth Circuit has taken a similarly hard line against review, even where courts have jurisdic-

tion over at least some of the merits of a case. In *Ngure v. Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004), the Eighth Circuit held that the BIA's use of the affirmance-without-opinion procedure "in a particular case is committed to agency discretion and not subject to judicial review." As the court noted, the subsection (e)(4) procedure was established to help the BIA better allocate its scarce resources, an area "traditionally . . . free from judicial supervision." *Ngure*, 367 F.3d at 983. The Eighth Circuit, like the Second Circuit, also found judicial review thwarted by the prohibition against a BIA member making a record when using the affirmance-without-opinion procedure. The court thus concluded that, given the "basic principle of administrative law that where agency action is subject to judicial review, the agency must provide an adequate reasoned explanation of its decision," streamlining decisions cannot be reviewed on appeal. *Ngure*, 367 F.3d at 984.

Critically, *Ngure* predicated its holding on the claim that "it is not possible to devise a meaningful and adequate standard of review with respect to either" the third or fourth criteria of (e)(4). 367 F.3d at 985. This holding, made without caveat or exception, was expressly rejected by the Third Circuit in *Smriko*:

> [T]hese criteria [discussed in subsection e(4)] present "the kinds of issues [courts] routinely consider in reviewing cases," and provide amply sufficient "law" for courts to apply. The fact that they may require the exercise of some discretion on the part of the single BIA member that may be deserving of some deference is, of course, not relevant; the APA

> expressly authorizes review of the exercise of discretion for abuse.

Smriko, 387 F.3d at 292–293 (citations omitted). Thus, much like the Second Circuit in *Kambolli*, the Eighth Circuit has refused jurisdiction over a streamlining challenge even though it had jurisdiction to review the merits of the petitioner's withholding of removal claim.

C. The Tenth Circuit Has Rejected Jurisdiction to Review Certain Streamlining Decisions on the Grounds That the INA Includes a Statutory Bar Against Judicial Review.

Further complicating the debate, the Tenth Circuit has adopted a rule that conflicts with both of the absolute positions explored above: judicial review of streamlining decisions is allowed, but *only* in those cases in which appellate jurisdiction over some aspect of the underlying merits of the BIA decision is not restricted by statute.

This convoluted approach originated in *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004). In *Tsegay*, the court held that the question of whether to use affirmance-without-opinion procedures is committed to agency discretion by law and, therefore, not reviewable on appeal. 386 F.3d at 1356. But, in order to distinguish *Batalova*, 355 F.3d 1246—an earlier case in which the Tenth Circuit held that court *have* jurisdiction to review streamlining decisions—the *Tsegay* court concluded that jurisdiction over streamlining decisions remains available in cases in which the court has jurisdiction over some aspect of underlying merits of the appeal. 386 F.3d at 1347. As a result,

the Tenth Circuit has developed its own conditional approach to judicial review of streamlining decisions—in effect, that while streamlining decisions are not "committed to agency discretion by law" under 5 U.S.C § 701(a)(2), judicial review of streamlining decisions is barred by 5 U.S.C. § 701(a)(1) unless jurisdiction over the underlying appeal is present.

This middle-ground position contradicts aspects of both categorical rules. On one hand, it rejects the Second and Eighth Circuits' holding that streamlining decisions are committed to agency discretion, as the Tenth Circuit allows review of streamlining decisions in certain cases. On the other hand, by requiring a court to have jurisdiction over some other aspect of an appeal in order to review the BIA's application of subsection (e)(4), the Tenth Circuit's conditional approach erects a barrier to jurisdiction unrecognized by the First, Third, Fifth, Sixth, and Ninth Circuits.

D. The Circuit Split Regarding Review of Subsection (e)(4) Determinations Is Acknowledged and Indisputable.

Despite the tripartite conflict regarding the question presented, the circuits unquestionably agree that this circuit split is well recognized and firmly entrenched.

1. Nearly every major decision addressing the subject has acknowledged that the circuits are divided. *See, e.g.*, *Kambolli*, 449 F.3d at 459–460, 463 (noting split, following *Ngure* and *Tsegay*); *Smriko*, 387 F.3d at 294–295 (noting split, rejecting *Ngure*); *Ngure*, 367 F.3d at 988 (noting split); *Tsegay*, 386 F.3d at 1354. The split's existence is confirmed by

courts that have purported to avoid entering the debate. *See, e.g.*, *Hassan v. Gonzales*, 403 F.3d 429, 437 (6th Cir. 2005) (noting split); *Kacaj v. Gonzales*, 132 Fed. Appx. 584 (6th Cir. 2005) ("Several courts of appeals have arrived at different conclusions on [the streamlining] issue[.]").

Indeed, even the Executive Office for Immigration Review (EOIR), in a since-abandoned rulemaking, acknowledged the division among the circuits regarding appellate jurisdiction to review streamlining decisions. *See* Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents, 73 Fed. Reg. 34,654, 34,657 (June 18, 2008) (discussing split). Though the EOIR cleared a final version of an amendment to 8 C.F.R. § 1003.1(e) that would have purported to restrict appellate review of streamlining decisions, the Department of Justice withdrew the proposed rule in December 2008. *See* American Immigration Law Foundation, Litigation Clearinghouse Newsletter (Jan. 9, 2009).[2] As a result, the circuit split remains live and controversial—the mere fact that the agency might *like* to shield such determinations from judicial review does nothing to obviate the split's existence or impact.

2. This conflict among the circuits cannot be recast as a limited dispute regarding whether to exercise streamlining jurisdiction *when* underlying jurisdiction is present—as the government has claimed elsewhere. *See, e.g.*, 73 Fed. Reg. 34,657 (2008). The Third Circuit's opinion in *Smriko* went to great

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[2] *Available at* http://www.aila.org/content/default.aspx?docid=27583.

lengths to explain that judicial review of streamlining decisions is in no way restricted by the APA—a holding that rejects the premise that the APA requires underlying jurisdiction before a streamlining decision may be reviewed. Likewise, the categorical bar recognized by the Second and Eighth Circuits holds streamlining committed to agency discretion by law under 5 U.S.C. § 701(a)(2), an analysis unaffected by whether the courts also have jurisdiction over other, unrelated issues. Only the Tenth Circuit has given any suggestion that underlying jurisdiction somehow affects the debate over streamlining jurisdiction.

Furthermore, any argument that the INA's removal of appellate jurisdiction over aspects of cancellation-of-removal proceedings impacts the streamlining debate simply cannot withstand scrutiny. Although the APA *could* bar review of streamlining decisions if any statute eliminated such jurisdiction, the INA provision that insulates some immigration decisions from judicial review, 8 U.S.C. § 1252(a)(2)(B), expressly preserves judicial review of questions of law arising out of such petitions—only purely discretionary decisions are insulated from review. Under the *Smriko* rule, streamlining decisions are questions of law that fit within this exception, ensuring that judicial review is available even where jurisdiction to review the underlying discretionary decision at issue is lacking. *See* Part IV, *infra*.

The government has an obvious interest in minimizing the scope of the circuit split, to cultivate the impression that streamlining decisions made in cancellation-of-removal proceedings remain unreviewable under any circuit's approach. But nothing

in the APA or INA supports any pretense that the circuits are not divided over the availability of judicial review over streamlining decisions even in cases such as petitioner's, where the court of appeals did not have jurisdiction to review the underlying merits of his BIA appeal. To focus on underlying jurisdiction is to take a side in the debate amongst the circuits, not to explain the disagreement away.

II. The Circuits Are Similarly Split Regarding Jurisdiction to Review BIA Refusals to Refer Appeals to Three-Member Panels Under Subsection (e)(6).

By reviewing this case, this Court would also provide critical guidance on a parallel split regarding whether the courts of appeals have jurisdiction to review BIA compliance with another subsection of the streamlining regulations, 8 C.F.R. § 1003.1(e)(6). To date, some courts hold that the courts of appeals have jurisdiction to review a single BIA member's refusal to send a case to a three-judge panel under subsection (e)(6), while others take the opposite view. This split is significantly related to—and in most cases intertwined with—the split that has emerged about the reviewability of decisions under subsection (e)(4).

1. As explained above, every decision by a BIA member to affirm without opinion under subsection (e)(4) necessarily includes within it a prior decision under subsection (e)(6) to not refer the case to a three-member panel. *See supra* pp. 3–4. Whether the single BIA member subsequently affirms without opinion under subsection (e)(4) or writes a short opinion under subsection (e)(5), therefore, makes lit-

tle difference—in both cases, the BIA member had to *first* decide to keep the case.

The close relationship between these two streamlining decisions—whether to refer to a full panel under subsection (e)(6) and whether to affirm without opinion under (e)(4)—has been recognized throughout the courts. For example, the Second Circuit in *Kambolli* explained that "[i]n nearly all cases of unilateral decisions without opinion [under subsection (e)(4)], the BIA member's review of the merits of the underlying IJ decision will merge with his choice to dispose of the case without reference to a three-member panel." *Kambolli*, 449 F.3d at 462 n.12. Given this overlap, it is not surprising that cases evaluating review of affirmances without opinion under subsection (e)(4) have relied upon subsection (e)(6) precedents, and vice versa. *See, e.g., Purveegiin v. Gonzales*, 448 F.3d 684 (3d Cir. 2006) (applying *Smriko* to non-affirmance-without-opinion case; explaining that both subsections (e)(4) and (e)(6) "impose affirmative limits on a single member's authority to resolve an appeal without panel participation").

Here, petitioner expressly argued below that his BIA appeal should be resolved by a three-member panel due to the absence of controlling precedent governing cancellation-of-removal petitions made by children of permanent resident parents, as opposed to parents of permanent resident children. Pet. App. 8a–9a. As a result, the instant case presents this Court with the means to resolve both circuit splits simultaneously

2. Like the split about the reviewability of decisions under subsection (e)(4), the split under subsec-

tion (e)(6) is indisputable. As is unsurprising given the close relationship between the two determinations, the splits parallel each other.

a. The Third and Fourth Circuits have expressly found jurisdiction to review decisions to decline to refer a case to a three-member panel.

In *Purveegiin*, the Third Circuit rejected the argument that whether to send a case to a full panel was committed to agency discretion. Reading subsections (e)(5) and (e)(6) in tandem, the court held that referral to a three-member panel was mandatory in all cases satisfying subsection (e)(6)'s requirements. 448 F.3d at 689–690. Much like in the affirmance-without-opinion cases, the *Purveegiin* court found jurisdiction over streamlining decisions without any reference to whether it also had jurisdiction over the merits of the case. Rather, it turned to the merits only *after* settling the jurisdictional question of streamlining. *See id.* at 692.

The Fourth Circuit reached the same conclusion in *Quinteros-Mendoza v. Holder*, 556 F.3d 159 (4th Cir. 2009). Although the *Quinteros-Mendoza* court recognized "the division in the circuits on this question," it agreed with the Third Circuit that it had jurisdiction over subsection (e)(6) decisions. 556 F.3d at 163. According to the court, "the six factors found in § 1003.1(e)(6) are not cast in such discretionary terms as to preclude meaningful review of them." *Id.* at 163. Like the Third Circuit in *Purveegiin*, the *Quinteros-Mendoza* court made no suggestion that its broad holding in favor of jurisdiction required the court to have jurisdiction over the underlying merits of the case.

b. In contrast, the Second and the Eighth Circuits have concluded that the courts of appeals lack jurisdiction to review a BIA member's refusal to refer a case to a three-member panel.

The Eighth Circuit's opinion in *Ngure* addressed both the three-member-panel question and the affirmance-without-opinion question in tandem. In the process, the *Ngure* court disagreed with nearly every conclusion later reached by the Third Circuit in *Purveegiin*, holding (1) that subsection (e)(6)'s factors governing full-panel review were not mandatory, see *Ngure*, 367 F.3d at 986–988; *but see Purveegiin*, 448 F.3d at 689–690); (2) that the streamlining regulations did not provide immigrant applicants with any "important procedural benefits," *see Ngure*, 367 F.3d. at 984–985; *but see Purveegiin* 448 F.3d at 690–692; and (3) that streamlining decisions were never intended to be susceptible to judicial review, *see Ngure*, 367 F.3d. at 984–985. The court later reiterated this holding in *Bropleh v. Gonzales*, 428 F.3d 772 (8th Cir. 2005), a non-affirmance-without-opinion case that only presented the question of whether "the Board of Immigration Appeals erred in its decision not to refer Bropleh's appeal to a three-member panel." *Id.* at 779.

The Second Circuit reached the same conclusion in *Kambolli*. There, the court concluded that "the language of subsection (e)(6) allowing reference to three-member BIA panels in certain circumstances does not provide a meaningful standard for judicial review." 449 F.3d at 461 & n.11. The Second Circuit concluded that that it lacked jurisdiction to review decisions by a single BIA member to affirm IJ decisions "without reference to a three-member BIA

panel—substantially for the reasons articulated by our sister circuits reaching the same result." *See id.* at 463 (citing *Ngure*, 367 F.3d at 983, and *Tsegay*, 386 F.3d at 1353–1358).

c. The Tenth Circuit has similarly applied the same logic to streamling challenges based on subsections (e)(4) and (e)(6). In *Batalova v. Ashcroft*, 355 F.3d 1246 (10th Cir. 2004), the court of appeals recognized that subsection (e)(6) determinations could indeed be challenged before courts of appeals. *See Batalova*, 355 F.3d at 1252–1253. This position was refined in *Tsegay v. Ashcroft*, 386 F.3d 1347, 1358 (10th Cir. 2004), where the court suggested that it lacks jurisdiction to review a streamlining decision when it also lacks jurisdiction to consider the underlying merits of the appeal. As a result, the Tenth Circuit applies the same conditional approach to both streamlining regulations.

Thus, the courts of appeals remain bitterly divided over the reviewability of two related issues regarding the interpretation of 8 C.F.R. § 1003.1(e)'s streamlining provisions—refusals to refer cases to three-member panels as required by subsection (e)(6) and decisions to affirm without opinion under subsection (e)(4). While the two questions are analytically distinct, they overlap in substantial respects. This petition presents the Court with an ideal vehicle through which it can review both, resolving the more general question of whether streamlining decisions may be reviewed on appeal.

III. Judicial Review of BIA Streamlining Determinations Presents Several Issues of National Importance That Require This Court's Review.

Whether federal courts may review BIA streamlining decisions is of critical importance, both to persons involved in immigration decisions and to the courts of appeals themselves. As a result, this Court's intervention is warranted to finally resolve this longstanding dispute.

1. First, judicial review of streamlining decisions provides a much-needed check upon the general administration of the immigration appeals system. When the streamlining process was first adopted in 1999, it was justified based on an "enormous and unprecedented increase in the caseload of the [BIA]." *See* Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135 (Oct. 18, 1999). The number of annual appeals from IJ decisions had outpaced the BIA's capacity to render decisions, creating a substantial backlog. *Id.* Allegedly, streamlining was to respond by furthering four goals: (1) promoting uniformity in IJ decisions, (2) deciding cases in a more "timely and fair manner," (3) assuring the correct dispositions of individual cases, and (4) eliminating the BIA's backlog. *Id.* at 56,136. Yet experience teaches that this final goal—faster case resolution—has trumped all other considerations, leading the BIA to err frequently and to fail to develop consistent jurisprudence.

Judicial review of streamlining decisions would help to safeguard against these persistent, widespread problems. Absent such review, improper streamlining determinations will continue to under-

mine the accuracy and quality of BIA decisionmaking, prejudicing the rights of applicants in the immigration process.

a. Independent audits contracted by the EOIR and the ABA demonstrate that streamlining has allowed the BIA to process appeals far more quickly than before. *See* Dorsey & Whitney LLP, *Board of Immigrant Appeals: Procedural Reforms to Improve Case Management* ("Dorsey Report"), at 18 (July 22, 2003) (unpublished study, submitted to the American Bar Association Commission on Immigration Policy, Practice and Pro Bono)[3] (discussing "immediate effect" of streamlining rules on BIA backlog); Arthur Andersen & Co., *Board of Immigration Appeals (BIA) Streamlining Pilot Assessment Report* ("Andersen Report"), at 5 (2001) (study conducted on behalf of EOIR)[4] (streamlining "directly contributed to a 53% increase in the overall number of BIA cases completed during its implementation period"). Yet the single-member review system achieves this goal by constraining the BIA's ability to afford relief in any given appeal. As single members can never reverse when an IJ simply erred in applying existing law, *see, e.g.*, *Purveegiin*, 448 F.3d at 692 ("permission to 'reverse' a decision of an immigration judge" is "[n]otably absent" from subsection (e)(5)), any appeal

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[3] *Available at* http://www.dorsey.com/files/upload/DorseyStudyAba_8mgPDF.pdf.

[4] *Available at* http://www.dorsey.com/files/upload/DorseyStudyABA_8mgPDF.pdf, as Appendix 21 to the Dorsey Report.

must survive the streamlining process before an applicant can hope to prevail.

This restriction has a hard-to-dispute practical consequence: hasty use of the streamlining regulations has caused the BIA to repeatedly deny objectively meritorious appeals. Although the streamlining regulations have helped the BIA review an ever-increasing amount of appeals—thousands per month—the amount of *reversals* it grants has stayed amazingly constant. *See* Dorsey Report at 40; *see also id.* ("Before the spring of 2002, approximately one in four appeals was granted; since then, approximately one in ten appeals is granted."). If streamlining had no substantive effect on the outcome of appeals, one would expect the ratio of affirmed-to-reversed appeals to remain at least *close* to the pre-streamlining figures—it cannot be that the BIA's backlog included only meritless appeals. Instead, the statisitical evidence establishes that streamlining is having a substantive effect.

So long as unchecked single-member review remains the regulatory norm, the BIA will continue to erroneously reject scores of meritorious appeals. Judicial review of streamlining decisions would provide critical recourse against this injustice, by ensuring that valid appeals do not fall through the cracks.

b. The BIA's structural problems are magnified by its refusal to ensure consistent decisionmaking by developing a comprehensive body of jurisprudence. Although the streamlining regulations are designed to require three-member panel review whenever necessary to establish precedent on an issue, *see* subsection (e)(6)(ii), and to forbid use of the affirmance-without-opinion procedure in cases not "squarely

controlled" by existing precedent, *see* subsection (e)(4)(i)(A), the BIA has instead repeatedly abdicated its responsibility to resolve cases through precedential opinions. Instead, by affirming without opinion in so many situations in conflict with the regulations, the BIA has stunted the growth of a body of precedent that can be easily applied to the breadth of immigration appeals.

The instant case provides a clear example of this problem. Petitioner, the child of permanent resident aliens, applied for cancellation of removal based on the extreme hardship removal would cause both him and his family. At present, only three precedential cases regarding cancellation of removal even exist: *Monreal*, *Andazola*, and *Recinas*. All three of these cases focus on the hardship to resident *children* of a non-resident *parent* facing removal—the exact opposite of the issue presented by Arambula-Medina's cancellation request. Yet rather than issue a precedential decision on this subject, either in this case or any other that has presented it over the past several years, the BIA has fostered confusion and inconsistency by instead issuing non-precedential affirmances without opinion. As a result, the BIA's failure to properly apply the streamlining regulation has ensured inconsistent decisionmaking by immigration judges across the country, directly undermining both the quality and reliability of the immigration review process.

Petitioner is of course sensitive to the administrative issues facing the BIA, and he recognizes that almost any case could be cast as involving some "new" issue rendering it unfit for summary disposition. But, given the BIA's systemic failure to develop

any meaningful precedent regarding the cancellation-of-removal process, the government cannot take shelter behind some objection that too many cases would require full-panel review if compliance with the streamlining regulations were judicially enforced—this is a problem of the government's own creation. Having promulgated binding regulations promising the development of a clear and comprehensive body of law, the government cannot protest that compliance with its own regulations would be unduly burdensome. Rather, judicial review of streamlining decisions would only ensure that the BIA provides the attention that the regulations already require.

c. Streamlining's substantive effects are particularly troubling in cases such as petitioner's, where the underlying substantive issues are not subject to judicial review. *See, e.g.*, 8 U.S.C. § 1252(a)(2)(B). In cases where the merits of a BIA's decision are later reviewed by a court of appeals, any streamlining errors may be rendered harmless—the court will be free to address any substantive errors in the case regardless of what procedure the BIA followed. *See, e.g.*, *Batalova*, 355 F.3d at 1253 (noting that "it ma[de] little difference . . . whether the BIA acted through a single member or a three-member panel" where court could "directly review the IJ's decision, which the BIA member adopted"); *Falcon Carriche v. Ashcroft*, 350 F.3d 845, 851 (9th Cir. 2003 ("The IJ's decision becomes the final agency action when a case is streamlined. Thus, the streamlining procedures do not compromise our ability to review the INS's decision, to the extent we have jurisdiction to do so, because we can review the IJ's decision directly." (citations omitted)). But when such substantive review is

unavailable, the BIA's procedural compliance with the streamlining regulations is an applicant's only reassurance that his or her appeal has received fair consideration.

In such cases, whether the courts of appeals can review the correctness of BIA streamlining decisions is of critical importance. When a single BIA member errs when applying 8 C.F.R. § 1003.1(e)'s standards, otherwise-meritorious appeals fail to reach the only BIA panels capable of reversing IJ decisions. The promise of BIA review is thus rendered toothless, as victims of erroneous IJ decisions will never reach a body capable of affording them the relief they deserve. Dorsey Report at 7 (streamlining regulations make substantive mistakes "more likely to happen and more difficult to detect"). As such, even if the streamlining regulations can be justified in theory, practice under them consistently threatens the due process rights of immigration petitioners. Judicial review would hold the BIA accountable, helping to put an end to these absuses.

2. Furthermore, the advent of streamlining has served to overwhelm the federal courts of appeals. In part due to confusion regarding the appropriate scope of judicial review of immigration decisions, petitions to review BIA decisions have become a skyrocketing part of the federal appellate docket. Resolution of the question presented, regardless of this Court's answer, would have the valuable effect of reducing this strain.

The statistics in this area speak for themselves: "The increased quantity of BIA decisions, and the dissatisfaction of aliens and their counsel with unexpected affirmances, have created a surge of appeals

from the BIA to the federal courts of appeals." Dorsey Report at 40. In 1999, appeals from INS decisions constituted less than 2,000 of the over-54,000 appeals commenced throughout the federal courts of appeals. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts – 1999 Annual Report of the Director*, Table B-3 at 96 (1999).[5] Yet by 2003, after the adoption of the more stringent streamlining regulations now in effect, "BIA decisions were being appealed to the federal circuit courts at a rate of over 800–900 per month." Dorsey Report at 40. Last year, over 10,000 BIA decisions were challenged in the courts of appeals, with BIA appeals constituting over one-sixth of the *total* workload of the appellate courts. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts – 2008 Annual Report of the Director*, Table B-3 at 96 (2008).[6] This steady increase reflects both applicants' concerns regarding the substance of BIA decisions and the widespread uncertainty regarding the limits of judicial review.

3. Finally, there is little hope that the question presented will be resolved absent this Court's intervention. The conflict among the circuits on this point is entrenched, with the circuits aware of their conflicting views yet remaining divided. *See* Part I.D, *supra* (collecting cases). Nor is it likely that the executive branch will resolve the dispute. As noted

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[5] *Available at* http://www.uscourts.gov/judbus1999/b03sep99.pdf.

[6] *Available at* http://www.uscourts.gov/judbus2008/appendices/B03Sep08.pdf.

above, in June 2008 the EOIR initiated a rulemaking specifically targeting the question of judicial review of streamlining decisions—through a proposed rule purporting to expressly establish the BIA's intent that such determinations be unreviewable—but such efforts were abandoned. *See* 73 Fed. Reg. 34,654 (June 18, 2008); American Immigration Law Foundation, Litigation Clearinghouse Newsletter (Jan. 9, 2009). Moreover, even if such a new rule were adopted in the future, it would not eliminate the disagreement among the circuits: several have held that determinations under the current streamlining factors are reviewable regardless of the BIA's intent, *see, e.g.*, *Purveegiin*, 448 F.3d at 690, while others have preemptively held that the EOIR does not possess the statutory authority to adopt any unreviewable streamlining regime, *see, e.g.*, *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 162 (4th Cir. 2009). As a result, even if the agency were to adopt new regulations purporting to make streamlining decisions unreviewable, the circuit split would remain unresolved.

Only this Court can put an end to the longstanding division regarding judicial review of BIA streamlining determinations. Given that the streamlining system has been shrouded in uncertainty since its adoption, the Court should finally take the opportunity to provide much-needed clarity.

IV. Under the APA and This Court's Jurisprudence, Streamlining Decisions Are Subject to Judicial Review.

By refusing to exercise jurisdiction to review a BIA member's decision to affirm a case without opinion, the Tenth Circuit contradicted this Court's in-

structions regarding the scope of judicial review under the APA.

Any question of judicial review of streamlining decisions must begin with this Court's "strong presumption that Congress intends judicial review of administrative action." *See Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986). The APA codifies that presumption at 5 U.S.C. § 701(a), which provides that Congress can only preclude judicial review of final agency action by adopting an express jurisdiction-stripping provision, *see* 5 U.S.C. § 701(a)(1), or by committing agency action "to agency discretion by law," *see id.* at § 701(a)(2). *See also Quinteros-Mendoza*, 556 F.3d at 162. Neither of these limitations serves to bar judicial review of streamlining decisions. As a result, when properly construed, 8 C.F.R. § 1003.1(e) creates judicially enforceable standards that constrain the decisionmaking of BIA members.

1. First, no statute purports to eliminate judicial review of streamlining decisions. *See Smriko*, 387 F.3d at 290–291. Though the Secretary of Homeland Security is broadly empowered to adopt regulations governing the administration of immigration laws, *see* 8 U.S.C. § 1103(a)(3), nothing in this grant of authority suggests that the administration of those regulations is inherently unreviewable. Rather, this Court has regularly distinguished between review over an agency's power to *promulgate* regulations, which is strictly limited, and review of an agency's *adherence* to such regulations, which is broadly available. *Compare Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 523–525 (1978), *with Morton v. Ruiz*, 415 U.S. 199, 235–236 (1974), *and*

Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538–539 (1970); *see also* 33 Charles H. Koch, Jr., *Federal Practice & Procedure* § 8392 at 384–385 n.3 (2006). Furthermore, though certain immigration-related decisions are made unreviewable by the Immigration and Naturalization Act ("INA"), *see e.g.*, 8 U.S.C. § 1252(a)(2)(B), the act expressly preserved judicial review of questions of law arising out of cancellation-of-removal proceedings such as Mr. Arambula-Medina's, *see* 8 U.S.C. § 1252(a)(2)(D). Thus, the statute preserves appellate jurisdiction of legal questions such as compliance with the streamlining regulations, and the EOIR lacks any authority to promulgate regulations purporting to restrict this statutorily granted jurisdiction.

The Tenth Circuit's claim that the lack of underlying merits jurisdiction in cancellation-of-removal cases can serve to preclude judicial review of streamlining decisions must, therefore, fail. Any statutory bar to judicial review of immigration matters preserves jurisdiction over non-discretionary legal decisions made as part of those matters, inviting the question of whether the streamlining factors are discretionary or mandatory. As a result, any claim that the INA bars review turns only upon whether such decisions are "committed to agency discretion by law" under 5 U.S.C. § 701(a)(2)—the crux of the conflict between the circuits.

2. As this Court has stressed, the "committed to discretion" exception is very narrow, applicable only "in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at

191 (quoting *Heckler*, 470 U.S. at 830). But here, no *statute* purports to commit streamlining decisions to agency discretion by law, or to establish standards unsusceptible to judicial review. *See, e.g.*, *Quinteros-Mendoza*, 556 F.3d at 162. Rather, decisions rejecting judicial review have relied on the tautological conclusion that the streamlining regulation itself, 8 C.F.R. § 1003.1(e), provides the BIA with the claimed "unreviewable" discretion. *See Ngure*, 367 F.3d at 985; *see also Quinteros-Mendoza*, 556 F.3d at 162–163 (rejecting argument).

Such a claim does not withstand scrutiny. Subsection (e)(4) provides that a BIA member "shall" issue an affirmance without opinion upon a finding that:

> the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that
>
> (A) The issues on appeal are squarely controlled by existing Board or federal precedent and do not involve the application of precedent to a novel factual situation; or
>
> (B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

8 C.F.R. § 1003.1(e)(4). As a result, the regulation creates a mandatory rule, not a permissive standard—affirmance without opinion *cannot* be used unless subsection (e)(4)'s factors are present.

Nor are subsection (e)(4)'s factors so malleable as to offer "no meaningful standard against which to judge the agency's exercise of discretion"—*Heckler*'s high standard for withholding judicial review. Rather, Section 1003.1(e) "provides more than enough 'law' by which a court could review" a BIA member's streamlining decision. *See Haoud*, 350 F.3d at 206; *cf. C.C. Distributors, Inc. v. United States*, 883 F.2d 146, 154 (D.C. Cir. 1989) ("Notwithstanding the lack of judicially manageable standards in the underlying statute, regulations promulgated by an administrative agency in carrying out its statutory mandate can provide standards for judicial review of agency action."). Indeed, many of subsection (e)(4)'s factors are determinations regularly made by courts of appeals in countless other contexts, such as judging a decision's accuracy," or reviewing whether the issues on appeal are squarely controlled by precedent. *Smriko*, 387 F.3d at 292–294. As a result, there is no reason that courts of appeals could not engage in meaningful review of streamlining decisions. *Id.*

Although the question is closer, detailed review of the streamlining regulations establishes that subsection (e)(6)'s factors are also mandatory. Subsection (e)(6) does state that a BIA member "may only" refer an appeal to a three-member panel upon a finding that one of the six factors is present, suggesting that referrals to full panels could be discretionary. *See Purveegiin*, 448 F.3d at 689. Reading subsections (e)(5) and (e)(6) together, however, it becomes clearer that the regulations *require* review by a three-member panel whenever a referral factors is present: "By directing that a single member 'shall' resolve a case 'unless' it falls within the categories of

paragraph (e)(6), [subsection (e)(5)] necessarily implies that a single member 'shall not' resolve a case if it does fall within one of those categories." *Purveegiin* 448 F.3d at 689. In any event, any concern that referral to a full panel under subsection (e)(6) is discretionary does not alter the fact that application of subsection (e)(4) is not.

Finally, review of streamlining decisions in denial-of-cancellation cases, such as Mr. Arambula-Medina's, would not constitute an end-run around the statutory unreviewability of the BIA member's underlying cancellation decision, as the Tenth Circuit incorrectly maintained. None of the subsection (e)(4) factors share common ground with the underlying merits of a hardship determination. In addition, allowing courts to review and remand cases that were improperly streamlined does not disturb the BIA's final and unreviewable authority over the substance of a hardship determination. Judicial enforcement of the streamlining regulations would simply ensure that individual immigration petitioners receive the full process promised to them by law, while also providing future applicants clearer direction regarding the potential merits of their claims.

Thus, under this Court's precedents and the controlling statutory provisions, the federal courts of appeals retain appellate jurisdiction to review BIA streamlining decisions. The Tenth Circuit's contrary decision is in error and should be reversed.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 2009

APPENDIX

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

LUIS ENRIQUE ARAMBULA-MEDINA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,

Respondent.

No. 08-9589

PETITION FOR REVIEW FROM AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Submitted on the briefs:

Robert Brown, Oklahoma City, Oklahoma, for Petitioner.

Stephen J. Flynn, Assistant Director, Office of Immigration Litigation; Ann M. Welhaf, Trial Attorney, Office of Immigration Litigation, Civil Division, United States Department of Justice, Washington, D.C., for Respondent.

Before KELLY, BRISCOE, and HOLMES, Circuit Judges.

BRISCOE, Circuit Judge.

Petitioner Luis Enrique Arambula-Medina (petitioner) has filed a petition for review seeking review of a final order of the Bureau of Immigration Appeals

(BIA) denying his application for cancellation of removal. Respondent has moved to dismiss the petition for lack of jurisdiction. Because we agree with respondent that we lack jurisdiction over petitioner's claims, we grant respondent's motion and dismiss the action.[1]

I

Petitioner, a native and citizen of Mexico, illegally entered the United States in 1991, at the age of five, along with his mother, Eva Cruz, and two younger brothers, Cesar and Adrian. The family has remained in the United States since that time, and Ms. Cruz, Cesar and Adrian are now lawful permanent residents of the United States. In addition, Ms. Cruz has given birth to three additional children, all of whom are United States citizens. Petitioner, however, remains an illegal alien.

In October 2006, Department of Homeland Security officials initiated removal proceedings against petitioner by filing a Notice to Appear (NTA). The NTA alleged that petitioner was neither a citizen nor national of the United States, was a native and citizen of Mexico, had arrived in the United States in late 1991, and was "not then admitted or paroled after inspection by an Immigration Officer." AR at

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[1] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is, therefore, submitted without oral argument.

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Petitioner appeared before an Immigration Judge (IJ), conceded the allegations in the NTA, and admitted he was removable as charged. Petitioner also, however, requested discretionary relief in the form of cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1),[2] asserting, in pertinent part, that his

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[2] Under 8 U.S.C. § 1229b(b):

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien —

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227 (a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully ad-

"removal would result in exceptional and extremely unusual hardship" to his mother. 8 U.S.C. § 1229b(b)(1)(D). The IJ held a hearing on the matter on August 23, 2007, during which petitioner, his mother, and four additional witnesses testified.

On November 15, 2007, the IJ issued a written decision and order denying petitioner's application for cancellation of removal. The IJ concluded petitioner had failed to establish that his "removal would result in exceptional and extremely unusual hardship" to his mother, who as a lawful permanent resident was a qualifying relative under 8 U.S.C. § 1229b(b)(1)(D). The IJ noted that petitioner was asserting "that his mother," who was approximately 36 years old, was "dependent upon him for the care of her younger children and, in part, because of her heart condition." AR at 53. The IJ found, however, that "the evidence presented" by petitioner "di[d] not establish a serious health issue" on the part of his mother. *Id.* at 54. The IJ also determined that, even if petitioner's mother did "suffer[] with a serious health issue, she ha[d] the support of her husband (Gregory Cruz), and sons, Cesar (age 19) and Adrian (age 17) to assist and support her." *Id.* In this regard, the IJ found that petitioner primarily provided support to his mother "on weekends, which he alternate[d] with []his brother, Cesar, in taking care of his mother's youngest sons, Edwin and Anthony." *Id.* Lastly, the IJ found:

> Quite frankly, upon reviewing the evidence presented it is the finding of this Court that

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mitted for permanent residence.

> it is [petitioner] who is dependent upon his mother for support, not his mother, the qualifying relative, who is dependent on him. More specifically, it is [petitioner's] mother who provides him considerable financial support. In fact, [petitioner] testified that his mother had made his last three rental payments as, due to excessive rain fall, he had not been able to mow lawns and work in landscaping. [Petitioner's] financial reliance on his mother was also indicated by his brother, Cesar, and by his girlfriend, Candi Clark, who stated that his mother helped [petitioner] when it was needed. Eva Cruz, in her own testimony, stated that she helps [petitioner] when necessary, as that is something a mother should do. The evidence clearly supports a finding that it is Eva Cruz, the mother, the qualifying relative, who is the source of strength in this family, and it is [petitioner] who is dependent upon her, not she upon him.

Id.

In denying petitioner's application, the IJ made three other relevant findings.[3] First, the IJ

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[3] The IJ also noted for the record that petitioner "ha[d] a long way to go, in his personal conduct, particularly in regard to his respect for the laws of this nation," having "chose[n] to use cocaine with his friends while in high school." AR at 49. The IJ also expressed concern with petitioner's "demonstrated disrespect for the government of this nation, as well

found that petitioner had "family ties in Mexico," including "two grandmas, aunts and uncles, and several cousins," that "would be of benefit to [him] upon removal to that country." *Id.* at 55. Second, the IJ found that because petitioner "has a carpenter's degree," "is a certified cabinet maker," "knows something about the electrical trades," and "is good at what he does, winning both state and national recognition for his skills," he possessed "all the requisite skills and knowledge to succeed" in Mexico. *Id.* Lastly, the IJ found that because Spanish was "the language [petitioner] first heard and spoke" and was the language that petitioner's mother spoke "at home," petitioner "would be able to adequately communicate in Mexico." *Id.*

Petitioner appealed the IJ's decision to the BIA. On November 24, 2008, a single member of the BIA, acting pursuant to 8 C.F.R. § 1003.1(e)(4), "affirm[ed], without opinion," the IJ's decision. *Id.* at 2. Petitioner has since filed a timely petition for review with this court.

II

We must first determine whether we have jurisdiction to review the issues raised by petitioner in his petition. *Sabido Valdivia v. Gonzales*, 423 F.3d 1144,

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as his demonstrated disrespect to" the IJ himself. *Id.* In particular, the IJ noted that petitioner acted in an angry and menacing fashion when the IJ explained in open court that petitioner "had not met the requisite hardship standard for the relief he sought . . ." *Id.*

1147 (10th Cir. 2005). The Immigration and Nationality Act provides that "no court shall have jurisdiction to review . . . any judgment regarding the granting of relief under section . . . 1229b." 8 U.S.C. § 1252(a)(2)(B)(i). We have construed the term "judgment" in this subsection as referring to the discretionary aspects of a decision concerning cancellation of removal. *Sabido Valdivia*, 423 F.3d at 1148-49. This includes any underlying factual determinations, *Diallo v. Gonzales*, 447 F.3d 1274, 1281 (10th Cir. 2006), as well as the determination of whether the petitioner's removal from the United States "would result in exceptional and extremely unusual hardship" to a qualifying relative under 8 U.S.C. § 1229b(b)(1)(D). *Morales Ventura v. Ashcroft*, 348 F.3d 1259, 1262 (10th Cir. 2003). We do, however, have jurisdiction to review "constitutional claims" and "questions of law." 8 U.S.C. § 1252(a)(2)(D).

Petitioner, obviously aware of our jurisdictional limitations, has attempted to frame each of the issues asserted in his petition for review in constitutional terms. In particular, petitioner contends that his due process rights were violated because: (1) the IJ made and relied upon erroneous factual findings in denying his request for cancellation of removal; (2) neither the IJ nor the BIA, in reviewing his request, applied controlling BIA precedent or regulation; and (3) the BIA summarily dismissed his appeal "without commenting or otherwise addressing any of the identified issues." Aplt. Br. at 16.

These purported due process challenges fail, however, for a fundamental reason. "In order to make out a claim for a violation of due process, a claimant must have a liberty or property interest in

the outcome of the proceedings." *Dave v. Ashcroft*, 363 F.3d 649, 652-53 (7th Cir. 2004). "But in immigration proceedings, a petitioner has no liberty or property interest in obtaining purely discretionary relief . . . ." *Id.* at 653. "Because cancellation of removal is a form of discretionary relief," petitioner "*cannot* raise a due process challenge to [the] denial of his application for cancellation of removal." *Id.* Because aliens do not have a constitutional right to enter or remain in the United States, the only protections afforded are the minimal procedural due process rights for an "opportunity to be heard at a meaningful time and in a meaningful *manner*." *de la Llana-Castellon v. I.N.S.*, 16 F.3d 1093, 1096 (10th Cir. 1994) (internal quotations omitted). "Beyond this basic protection guaranteed by the Fifth Amendment, any alleged liberty interest must be created by statute or regulation." *Aguilera v. Kirkpatrick*, 241 F.3d 1286, 1292 (10th Cir. 2001) (citing *Velasco-Guitierrez v. Crossland*. 732 F.2d 792, 796 (10th Cir. 1984)).

Even assuming, for purposes of argument, that petitioner could invoke due process, we are not persuaded that any of the purported violations he has identified have merit. With respect to his challenge to the IJ's factual findings, petitioner "simply points to the factual findings [he] disagrees with and then claims a due process violation occurred." *Martinez-Rodriguez v. Holder*, 313 Fed. App'x 154, 156 (10th Cir. 2009) (unpublished). "Recasting challenges to factual . . . determinations as due process or other constitutional claims," however, "is clearly insuffi-

cient to give this Court jurisdiction under § 1252(a)(2)(D)."[4] *Jarbough v. Att'y Gen. of U.S.*, 483 F.3d 184, 190 (3d Cir. 2007). The same holds true for petitioner's assertion that the IJ and BIA failed to apply what he characterizes as controlling BIA precedent and regulations. Lastly, the process employed by the BIA in petitioner's case, i.e., of having a single member affirm, without opinion, the IJ's decision, is clearly authorized by regulation. See 8 C.F.R. § 1003.1(e)(4) (authorizing affirmance without opinion). Moreover, petitioner has failed to explain how this procedure could possibly give rise to a due process violation when, as we have clearly held, "[a]n alien has no constitutional right to any administrative appeal at all." *Yuk v. Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004).

Respondent's motion to dismiss is GRANTED and the petition for review is DISMISSED for lack of jurisdiction.

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[4] If petitioner were correct in his characterization of the alleged errors as violative of due process, the jurisdictional exception for constitutional errors would end up swallowing the general jurisdictional prohibition barring review of judgments in cancellation of removal proceedings.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A099 814 770 - Oklahoma City, OK

In re: LUIS ENRIQUE ARAMBULA-MEDINA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robert Brown, Esquire

APPLICATION: Cancellation of removal

ORDER:

The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). In the event of the failure to so depart, the respondent shall be removed as provided in the Immigration Judge's order. *See* section 240B(b) of the Act; 8 C.F.R. §§ 1240.26(c), (f).

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
Executive Office of Immigration Review
Dallas Immigration Court
1100 Commerce Street, Suite 404
Earle Cabel Federal Building
Dallas, Texas 75242

Date: November 15, 2007.

File: A99-814-770.

In Immigration Removal Proceedings in the Matter of:
Luis Enrique Arambula Medina, Respondent.

Charge: Section 212(a)(6)(A)(i), INA.

Applications:
INA, Section 240A(b)(1) – Cancellation of Removal INA, Section 240B - Voluntary Departure

On Behalf of Respondent:
Robert Brown, Esquire,
1708 Broadway,
Oklahoma City, Oklahoma 73103.

On Behalf of DHS/ICE:
Thomas R. Murphy,
Assistant Chief Counsel, DHS,
Office of the Chief Counsel,
Dallas, Texas.

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a 21 year old single male,

native and citizen of Mexico. On October 2, 2006, the Department of Homeland Security/Immigration and Customs Enforcement charged the Respondent with being subject to removal from the United States to his native country and country of citizenship, Mexico. (Exhibit 1). During the course of the proceedings the Respondent entered pleas as follows:

Allegations: (1) The Respondent admitted that he is not a citizen or national of the United States; (2) The Respondent admitted that he is a native and citizen of Mexico; (3) The Respondent admitted that he arrived in the United States at or near El Paso, Texas, on or about December 23, 1991; and, (4) The Respondent admitted that he was not then admitted or paroled after inspection by an Immigration Officer.

Charge: The Respondent conceded that he was subject to removal from the United States to his native country, Mexico, pursuant to Section 212(a)(6)(A)(i), INA, as amended, in that he is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

Sustaining of the Charge: Based on the Respondent's pleas, this Court sustained the allegations and charge of removal against the Respondent.

Application for Relief: The Respondent provided that he would seek the relief of Cancellation of Removal, Section 240A(b)(1), INA. In the alternative, the Respondent would seek Voluntary Departure, Section 240B, INA.

II. STATEMENT OF THE LAW

Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents.

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien:

(A) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under Section 212(a)(2), 237(a)(2), or 237(a)(3) (except in a case described in Section 237(a)(7) where the Attorney General exercises discretion to grant a waiver);

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

III. EXHIBITS

Exhibit 1: Notice to Appear, dated October 2, 2006.

Exhibit 2: Application for Cancellation of Removal for Certain Nonpermanent Resident.

Exhibit 3: Results of Immigration Removal Proceedings.

IV. EVIDENCE

The following is derived from the record of proceeding, including testimonial, documentary, and other evidence presented at the hearing.

A. The Respondent, Luis Enrique Arambula-Medina, testified, in relevant part, as follows. (The testimony is summarized).

Direct Examination

The Respondent stated that he currently lives in Norman, Oklahoma. He said that he had lived in Norman for about six months. Before that he lived with his mother. He said that during high school he lived with his mother. He further stated that after high school that he had tried to live on his own.

The Respondent stated that he was now 21 years of age. He also stated that he graduated from Purcell High School in 2006. He said that he had attended Purcell schools since he was six years old.

The Respondent testified that he had to repeat his senior year of high school because he had used cocaine during the second semester, and had to complete a drug rehabilitation program. He stated that he had never sold cocaine. The Respondent said that cocaine was around his school. He further stated that using cocaine was a stupid thing to do.

The Respondent stated that on October 2, 2006, he was detained by "immigration."

The Respondent said that he did not have a drivers license. He further stated that he did not drive anymore. He said that his brother had driven him to his immigration hearing today. He also stated that

he had to depend on his mother to take him places.

The Respondent stated that he had never been to Mexico. He said that he wanted to go Mexico, but that he was afraid that he would not be able to get back into the United States. The Respondent said that he had some family in Mexico. His grandma (age, 90), another grandma (age, 70), and also some uncles and cousins live there. He said that he talks to some of them occasionally.

He said that he thought one of his aunts lived in Durango, and that one of his grandmas lived in Durango. He said that he did not have a lot of contact with them.

The Respondent stated that his mom and dad are divorced. The Respondent said that he did not get along well with his biological father. He said that his dad was unhappy about the Respondent's use of cocaine.

The Respondent said that he had to get along with his step-father, so he did.

The Respondent said that he did get along with his mother. He said that he wanted his mother to be happy, and that he tries to see his mother everyday.

The Respondent said that his mother has a heart condition, and that she stresses over the Respondent. He said that he thought that his mother's stress is caused in part because the Respondent and his dad don't get along. He said that he thought that was her main stress. He said that she also stresses over what may happen to him in regard to his immigration status.

The Respondent said that he loved his brothers,

especially Anthony (age 8) and Edwin (age 7). He said that he has always taken care of them since they were young.

The Respondent said that he was not as close to his younger sister, because she was a girl, and you can't do the same things with a girl.

The Respondent said that his father was never there for the kids, because his father was always working. The Respondent said that he would help with the kids. The Respondent said that he really did not know where his mother worked at this time, only that it was at a school.

The Respondent said that on weekends he would alternate with his brother Cesar in taking care of the younger brothers, Anthony (age 8) and Edwin (age 7). He said that in the summertime that he would help with the kids.

The Respondent said that his younger brother Cesar was 19, and that Cesar had done well for himself. He said that Cesar has a drivers license and green card.

The Respondent further stated that he only needed 12 hours to become a licensed general contractor. He further stated that he has a carpenter's degree, was a certified cabinet builder, and knew something about the electrical trades. He said that he learned these things at a vo-tech school, Mid-American Technology Center.

He said that he attended high school and vo-tech at the same time. He said that he had won recognition at both the state and national levels for his cabinet building. He said that he and another person had

made a video together, and placed 1st in the State. He said that they placed 14th in the national contest. He said that he had a certificate from the National Technology Student Association.

The Respondent further stated that in Mexico there was not the right equipment to do this kind of work.

The Respondent further stated that his illegal cousins that come to the United States from Mexico - tell him that he could not make it in Mexico. They tell him his Spanish is crappy. The Respondent said that he could not read or write Spanish and that he had failed Spanish in high school. He said that he knew Spanish slang, but that he did know the proper Spanish language. He said that he did not understand his friends from Mexico, and that he has trouble with his mother's Spanish.

The Respondent said that he thinks about going to Mexico. He also stated that he did not know the tools or technology of Mexico.

The Respondent said that in December of 2006 that his mother and brothers went to Mexico to visit, but that the could not go. He said that his mother wants him to visit Mexico.

The Respondent said that it was after high school that he started to realize that Cesar was his little brother. He said that they are getting closer and closer. He said that when they were young, that they "fought" as brothers do.

The Respondent said that his younger brothers, Adrian, Anthony, and Edwin looked up to him. He said that he was the first one to graduate from high

school.

The Respondent said that he and fiancé, Cindi, have a place together. He said that Cindi had left him for a while, but that she had came back to him. He said that he and Cindi talk about marriage and that one day they will get married. He said that he had known Cindi since the first grade. He said that he wants to have children one day.

The Respondent said that Cindi was a USC, and that her first husband was now in the penitentiary. She has a son, Isaiah, by her first husband. Isaiah lives with Cindi's parents, who are raising him.

The Respondent says that every month he pays his utilities, but that he mother has helped him with the rent. The Respondent said that he could not mow lawns when it rains, and it has rained a lot lately. This has resulted in his mother having to pay the rent.

The Respondent said that he had been out of rehabilitation for nearly two years.

The Respondent stated that it would be hard for him to go to Mexico. One of his grandmas is too old, while the other is a maid. He said that his aunt has a lot of kids. He said that life in Mexico is bad. He said that his mom could help him, but that he feels bad about asking for money.

The Respondent said that his illegal cousins who have visited the U.S. told him how hard Mexico is. He said that no one could help him in Mexico.

Cross Examination of the Respondent

The Respondent said that his real father lives in

Purcell. He said that his father owns a Mexican store. He said that his real father has no status in the United States, but that he has married a United States citizen.

The Respondent said that his step-father has status in this country. He works as an attendant at a Texaco station. His name if Cruz.

The Respondent said that his mother, step-father, and two younger brothers in his mother's home. He said his mother's home has 5 bedrooms, kitchen, dining room, and living room. He said that he thought that his mother owned the home.

The Respondent said that his mother works at a school as a janitor. He said that when school is out in the summer, that she does not work as the school is closed.

The Respondent said that his brother, Cesar, is 19 years old, and no longer lives at home. He lives in Norman, which is about 15 miles north of Purcell.

The Respondent said that his mother still drives a car. She has a couple of cars, and that she drove to his hearing.

The Respondent said that his brothers were 19, 17, 8, and 7 years of age. The Respondent said that he never used cocaine in front of his brothers. He said that he kept the cocaine at school. He used it with friends at school. He said that his cocaine was caused in part by his unhappiness with his father's "cheating." The Respondent that as a result of his cocaine use, that his grades went down. He said that he was never expelled from school. He also stated that he wished he had not done drugs.

The Respondent stated that he combined vo-tech school with high school, and that he did better with vo-tech. He said that he attended Mid-America Vo-Tech half a day, and then high school half a day. He also stated that his attendance at vo-tech was better than his attendance at high school. The Respondent said that he completed high school in 2006.

The Respondent stated that his fiancé, Cindi, does not work. She stayed at home and cleaned the house. She is a USC. Her son is being raised by her parents at their home.

The Respondent stated that he would not marry her just to get status.

The Respondent stated that his mother helps him with the rent. In fact, she has done so the past three months. He said that his illegal status makes it hard for him to be independent.

The Respondent said that his mother drives herself to the doctor. The Respondent said that his brother, Cesar, helps his mother, he said that they all helped her.

The Respondent said that he did not have a car. He said that his fiancé, Cindi, drove her parent's car.

Examination of the Respondent by the Immigration Judge

The Respondent said that in Mexico he had his grandmas, aunts and uncles, and cousins. He said that one of his uncles is an agricultural engineer for the state. He said that one of his aunts there already has five kids, while another aunt was married to a chemical engineer.

The Respondent said that he takes care of his two younger brothers, Anthony and Edwin, every other weekend. He said that someone will drop them off them at his home. He also said that Cesar will do that oftentimes.

The Respondent said that Cindi, his fiancé, does not work. The Respondent said that he did not want his fiancé to work, because he is the man of the house. He said wanted her to stay home. The Respondent said that Cindi's child lives with her parents.

B. The Respondent's brother, Cesar Arambula, age 19, testified in relevant part as follows.

Direct Examination

Cesar stated that the Respondent was always there for his brothers, and that they got along good. He said that the Respondent had raised the younger brothers.

Cesar said that his mother had heart problems, and that the thought of the Respondent leaving caused part of the stress. He said that if the Respondent was no longer in the United States, that he could not take care of the younger brothers.

He said that when his mother is at work that sometimes her heart is "irregular" and that her left arm goes dead, and that her heart hurts.

Cesar said that he looked up to his older brother, Luis.

Cesar said that one year ago the family went to Durango, Mexico, and stayed two weeks. He said that his Mexican relations were struggling, and that they probably could not help Luis.

Cesar said that he could not read nor write Spanish.

Cesar said that his mother is currently helping to pay his tuition, and that his mother probably could not help his brother if he was deported to Mexico.

Cross Examination

Cesar said that he worked part-time for Ideal Homes in Norman. He said that he was a "drafter" helping to design homes. He gets $10 an hour. He has been there 8 months. He said that he works about 28 hours a week.

He said that he lives in an apartment with 3 roommates, and that he takes 14 hours. He said that he wants a degree in architecture and that he goes to OCCC in Oklahoma City.

Cesar said that he drives a 2003 Nissan and that his mother makes the payments.

He said that he did not have health insurance. He said that cash must be paid for his health care.

Cesar also stated that his mother helps Luis financially.

Cesar said this employer gave him a $3,000 scholarship.

Cesar said that he pays his own rent, but that his mother pays for his car.

Cesar said that he and Luis take of the brothers on Sunday. Cesar said that he had taken his brothers to the hospital.

C. The Respondent's mother, Eva Cruz, testified, in summary, as follows:

Direct Examination

Ms. Cruz stated that Luis is her eldest son, and that she would be very affected if he was deported. She said that he is a great help with her younger children. She said that Luis has been like a father to them. She stated that she would call Luis and that he would pick her children up after school. She said that Luis' girlfriend would take Luis in her car to get the children.

Ms. Cruz said that she helps Luis when necessary, further stating that a mother should help her son. She said that she could not help Luis if he is in Mexico because she works and has kids. She said that "they" are poor in Mexico. S he said that she had three children at home. Ms. Cruz said that she makes between $400 and $500 a week. She said that she nets about $900 a month, and that she receives this 9 months a year.

Ms. Cruz said that Luis takes her children to church, to eat, to watch T.V., and other things. She said whoever is available helps with the children. She said that Luis takes care of the children every afternoon. Ms. Cruz said that as the mother, she is responsible for her children.

She said that her current husband is step-father to Luis. She said that he made about $450 a week. She further stated that her husband has two children of his own and that he pays child support. She said that she and her husband join their money. She said that her husband also helps with the children, and that she relies on her three older sons to help with the younger sons.

Ms. Cruz said that she owns her home. It is paid in full. She said that her home is worth about $80,000.

She said that she works in Norman.

Ms. Cruz said that her three youngest children receive Medicaid. She said that if she accepted insurance at her work place she would get less money.

Ms. Cruz said that she has a heart problem, and that the doctor told her it was an irregular heart beat. She said that there was not enough blood circulating in her body. She said that sometimes her heart pounds hard, and that she feels agitated. She said that she can't work at those times. She said that she is unable to lift heavy things.

She said that a friend of hers, who is a nurse, comes to check on her heartbeat each day at her home.

She said that she had been prescribed atenolol. She said that she feels depressed about her condition and also depressed about her good son.

Cross-Examination

Prior to examining the witness, Government Counsel noted that Tab 8 of Exhibit 2, specifically a medical report from the Purcell Cardiology Outpatient Clinic dated June 21, 2007, provided that Eva Cruz's blood pressure was 124/70; her heart rate was 80; and that she had no heart murmurs. Government Counsel also noted that an Echocardiagram Report dated June 26, 2007, reflected that Eva Cruz had a very irregular heart rhythm (also, Tab 8 of Exhibit 2).

Ms. Cruz stated that her doctor allows her to work

and drive to work. She said that she made between $450 and $500 a week. She said that she also gets $660 to $680 in child support. She also gets $1,200 from her current husband.

Ms. Cruz also stated that she chose not purchase medical insurance at work. Instead her younger children use Medicaid.

She said that her children speak mixed Spanish to her. She said that she speaks Spanish to her children at home. She said that the primary language of her children was Spanish when they grew up.

Ms. Cruz said that she paid her son's rent in August, and that it was $380. She said that he paid it the previous two months.

She said that Luis no longer drove a car. She said that his girlfriend took him to school to pick up the younger children.

Ms. Cruz said that she had 5 siblings in Mexico, most around Durango.

Examination by the Immigration Judge

Ms. Cruz said that she had not missed work due to her heart.

She also stated that during the second semester of the school year, Luis had picked the younger children up maybe six times. She said that the other children also pick them up.

She said that she took atenolol for her heart. This is when the heart rate is over 80.

Government Counsel noted that on the June 21, 2007, from the Purcell Cardiology Outpatient Clinic,

that Ms. Cruz had provided that she had occasional shortness of breath, but denied chest pain.

D. Cindi Clark, the Respondent's girlfriend, testified, in part, as follows:

Direct Examination

She said that she and the Respondent had been together for 14 months. During that time they had separated for two months.

She said that the Respondent had a very close relationship with his mother. He talks to his mother twice a day.

She said that the Respondent's mother gives him money every once in a while.

V. LEGAL AND FACTUAL ANALYSIS

Congress created the relief of cancellation of removal under section 240A(b)(1) of Act as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Public Law No. 104-208, 110 Stat. 3009-546. In order for an alien to qualify for cancellation of removal, the alien must establish that:

(A) he has been physically present in the United States for a continuous period of not less than ten (10) years immediately preceding the date of his application;

(B) he has been a person of good moral character during such period;

(C) he has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act; and,

(D) his removal would result in an exceptional and extremely unusual hardship to his spouse, child, or parent, who is a citizen of the United States or a lawful permanent resident. See INA, Section 240A(b)(1).

A. Ten Years Continuous Physical Presence in the United States.

Under section 240A(b)(1)(A) of the Act, the respondent must show that he has been physically and continuously present in the United States for ten years preceding the date of his application for cancellation of removal. The ten year period of continuous physical presence ends "when the alien is served a notice to appear." See INA, section 240A(d)(1). Moreover, the respondent must not have departed the United States for any period in excess of 90 days or for any periods that in the aggregate exceeds 180 days. See INA, section 240A(d)(2).

Courts Finding: This Court will not deny the Respondent's application for cancellation of removal for failure to establish ten years of continuous physical presence.

B. Good Moral Character.

Under section 240A(b)(1)(B), in order to be eligible for cancellation of removal, the respondent must also show that he has been a person of "good moral character" for not less than 10 years immediately preceding the date of his application.

Good moral character is a term of art defined under section 101(f) of the Act and includes seven enumerated actions or behaviors that disqualify an individual from qualifying for cancellation of removal, spe-

cifically providing that no person shall be found to have good moral character if it is established that the person: (1) is a habitual drunkard, (2) is inadmissible under various sections of 212(a) of the Act, (3) derives income principally from gambling,(4) has been convicted of two or more gambling offenses, (5) has given false testimony in order to obtain any benefits under the Act, (6) has been incarcerated for an aggregate period of more than six months, or, has been convicted of an aggravated felony. Further, section 101 (f) allows the Court in its discretion to find a person to lack good moral character.

Courts Finding: This Court will not deny the Respondent's application for failure to establish good moral character.

However, this Court strongly emphasizes for the Record that this Respondent has a long way to go in his personal conduct, particularly in regard to his respect for the laws of this nation. As reflected in the Record, this Respondent chose to use cocaine with his friends while in high school. By doing so, he knowingly broke the drug laws of this nation. Also by doing so, he contributed to the financial well-being of those who sell drugs to this nation's youth, those who for profit poison our children. This Court does not lightly dismiss the actions of those who use drugs, nor their financial contributions to those who sell drugs. If no one purchased drugs, the cartels would become non-existent, not only unable to profit from their poisonous merchandise, but also without the resources to support their other nefarious activities. This Court notes that the Respondent's high school teacher, Ms. Swope, stated that in the Respondent's school, maybe as much as 1/3 of the student had used drugs, with differing degrees of us-

age. What that means is that in her estimation, 2/3 of the students did not do so. The Respondent chose to be in the minority position of using drugs. It would be costly to him, requiring him to spend additional time before graduating. To his credit, after making the very wrong decision to begin drug usage, he made very right decision to stop it. In fact, he completed a period of drug rehabilitation, that hopefully will continue to be successful for him.

This Court is further concerned with the Respondent's demonstrated disrespect for the government of this nation, as well as his demonstrated disrespect to this Court. In regard to his disrespect of this Court, the following is provided. As I, the presiding Judge in this hearing, was in the midst of explaining to the Respondent and his family, many of whom were present, why I believed that the Respondent had not met the requisite hardship standard for the relief he sought, the Respondent gave this Judge a menacing, glaring look—that clearly reflected his disrespect and contempt for this Court, for the decision of this Judge. For the first time ever, this Judge noted on the Record a Respondent's glaring, menacing look - none had ever occurred previously. This Court informed the Respondent that it was not going to put up with such contemptuous disrespect. The Respondent responded, stating, in part, that he was just giving it to himself. He stated he guessed it was the government's fault. This Court, then advised and now advises the Respondent that his situation was and is not the government's fault—the same government that provided him the opportunity to seek relief before this Court—the same government that more than any other nation understood and understands the value of immigrants.

Clearly, the Respondent's mother and younger brother Cesar are model examples of immigrant success stories. Shortly thereafter, and before the hearing was concluded, the Respondent left the table he was sitting at, left his counsel, and left the courtroom—slamming the courtroom door as he angrily departed. After a few minutes, through, in part, the efforts of his counsel, the Respondent subsequently returned to the courtroom.

Prior to this incident, this Court had provided that while it would not grant cancellation of removal, it would grant voluntary departure. After the incident, this Court indicated that it would have to reconsider granting voluntary departure. Upon careful consideration, this Court will, as noted below, grant voluntary departure the Respondent. This decision is based in significant part in consideration of the Respondent's mother, and the efforts she has made to provide for her family while in the United States, including this Respondent.

C. Criminal Convictions.

Another requirement that must be met in order to establish the respondent's eligibility for cancellation of removal is that he cannot have been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) of the Act. See INA, section 240A(b)(1)(C).

Courts Finding: This Court will not deny the Respondent's application for cancellation of removal due to a disqualifying criminal conviction.

D. Exceptional and Extremely Unusual Hardship.

As a final requirement to establishing eligibility for

cancellation of removal, the respondent must show that his removal from the United States would result in an "exceptional and extremely unusual hardship" to his qualifying relatives. See INA, section 240A(b)(1)(D). In the instant matter, the Respondent has provided in Block 17 of his Application for Cancellation of Removal for Certain Nonpermanent Resident (Exhibit 2) that his **qualifying relative is his LPR mother.**

The Board of Immigration Appeals ("Board") has interpreted the "exceptional and extremely unusual hardship" requirement in three recent cases. In the first case, *Matter of Monreal*, the respondent was a 34-year old male, native and citizen of Mexico who was married with three U.S. citizen children. *Matter of Monreal*, 23 I&N Dec. 56, 57 (BIA 2001). One of the respondent's children was an infant and the other two were ages 12 and eight. The children were in good health and the oldest child could fluently read, write, and speak both Spanish and English. *Id.* at 64. The respondent's wife, who was not eligible for cancellation of removal, voluntarily departed to Mexico shortly before the respondent's hearing on his application, and she took their infant child with her. The respondent's parents and seven of his eight siblings lawfully resided in the United States, with one sibling living in Mexico. *Id.* at 57. The respondent had been "gainfully employed" since his arrival to the United States. *Id.*

The Board in *Monreal* stated that in order to meet the "exceptional and extremely unusual hardship" test for cancellation of removal, an applicant "must demonstrate that his or her spouse, parent, or child would suffer hardship that is substantially beyond that which would ordinarily be expected to result from the alien's

deportation, but need not show that such hardship would be unconscionable.' *Id.* at 56. In establishing eligibility, the Board further stated that "only hardship to the qualifying relatives, not to the applicant, himself or herself, may be considered." *Id.* The Board listed several factors to be weighed, namely the ages, health, and circumstances of the qualifying relatives, including "a child with very serious health issues, or compelling needs in school." *Id.* at 63. Moreover, "[a] lower standard of living or adverse country conditions in the country of return are factors to consider only insofar as they may affect a qualifying relative." *Id.* Finally, the Board stated that "all hardship factors should be considered in the aggregate when assessing exceptional and extremely unusual hardship." *Id.* at 64.

In applying this standard, the Board held that the respondent in *Matter of Monreal* did not qualify for cancellation of removal. The Board stated that both the children and the respondent were in good health, and there was no evidence showing that the respondent would be unable to work and support his United States citizen children in Mexico. In fact, the respondent had a brother in Mexico who had worked in the same business as the respondent had for the past ten years in the United States. The Board also found that because the respondent's wife was already in Mexico with one of his children, the family would actually be reunited. *Id.* at 64. Furthermore, the Board stated that since the respondent's oldest child was fluent in Spanish, he would not suffer hardship in adjusting to life in Mexico. For these reasons, the Board held that even when considering all of these factors cumulatively, the respondent had not met his bur-

den of establishing that his children or parents would suffer exceptional and extremely unusual hardship if he were removed. *Id.* at 65.

In the second case, *Matter of Andazola*, the Board further interpreted the meaning of the "exceptional and extremely unusual hardship." The facts of that case presented the respondent as a 30-year old woman who was a native and citizen of Mexico with two children, ages 11 and six. The respondent stated that she was a single mother, although she lived with her significant other who was also the father of her children. *Matter of Andazola*, 23 I&N Dec. 319, 320 (BIA 2002). The respondent was employed, owned a house valued at $69,000, two vehicles valued at $12,000, and had $7,000 in savings. All of the respondent's siblings resided illegally in the United States and she had no children who could help her with her children. *Id.* The respondent stated that, if removed to Mexico, she was worried that she would be unable to find a job comparable to the job she had in the United States. She was also worried that her children would not be able to get "much education in Mexico, especially when they get older and reach the point where she would have to pay for it." *Id.* The oldest child did not speak "academic Spanish" and therefore might be placed in a lower grade in Mexico.

The Board in *Matter of Andazola* held that the respondent was not eligible for cancellation of removal because she did not meet the "exceptional and extremely unusual hardship" standard. The Board found that although the respondent's children may be deprived of the education available to them in the United States if they were relocated to Mexico, they would not be deprived of all schooling and would

likely receive up to a ninth grade education in Mexico. *Id.* at 323. Furthermore, while the respondent did not have any family in Mexico, the Board held that it would not "consider the fact that the respondent's family is here illegally, rather than in Mexico, as a factor that weighs in her favor." *Id.* Moreover, the Board found that the respondent was not a single mother because her significant other lived with her, provided financial support to their family, and could continue to help support the family while they were in Mexico. The Board also found that because the respondent had meaningful equity in her house, cars, $7,000 in savings, and a retirement fund, she would be able to establish a "new life in Mexico." *Id.* at 324. Finally, the Board held that because "the fact pattern presented [is] a common one, and the hardships the respondent has outlined are simply not substantially different from those would normally be expected upon removal to a less developed country," *Id.* at 324, the respondent had not met the "exceptional and extremely unusual hardship" standard and was therefore ordered removed to Mexico.

In the third case, *Matter of Recinas*, 23 I&N Dec. 467 (BIA 2002), the Respondent, a single mother who had no immediate family remaining in Mexico, provided the sole support for her six children, and had limited financial resources, established eligibility for cancellation of removal under Section 240A(b) of the Immigration and Nationality Act, 8 U.S.C., Section 1229b(b) (2002), because she demonstrated that her United States citizen children, who were 12, 11, 8, and 5 years old, would suffer exceptional and extremely unusual hardship upon her removal to her native country.

The factors included in assessing the hardship to the Respondent's children included the heavy burden imposed on the Respondent to provide the sole financial and familial support for her six children if was deported to Mexico, the lack of any family in her native country, the children's unfamiliarity with the Spanish language, and the unavailability of an alternative means of immigrating to this country.

In sum, the Board has established the following criteria for determining an individual's eligibility for cancellation of removal based on the "exceptional and extremely unusual hardship" standard. The individual must demonstrate that her qualifying relatives would suffer hardship that is "substantially beyond that which would ordinarily be expected to result from the alien's deportation, but need not show that such hardship would be 'unconscionable.'" *Matter of Monreal*, 23 I&N Dec. 56, 57 (BIA 2001). Factors that may be taken into consideration by the Court include the ages, health, and surrounding circumstances of the qualifying relatives. Such surrounding circumstances include: (a) any compelling needs which the qualifying relatives may have in school in the United States; (b) the level of education available to the qualifying relatives in the country of return; (c) the amount of support (financial, emotional, psychological, or otherwise) available to qualifying relatives in the United States and in the country of return; (d) the respondent's available equity in the United States; (e) the adverse conditions or lower standard of living of the country of return in so far as they affect the qualifying relatives; and, (f) any other circumstances related to the respondent insofar as they affect the qualifying relatives. Furthermore, these hardship factors must be considered in

the aggregate so that no single factor need determinatively establish that the qualifying relatives will suffer exceptional and extremely unusual hardship.

The Court will now address the relevant hardship factors in this case.

The Respondent claims his mother as his qualifying relative, asserting in part that his mother is dependent upon him for the care of her younger children and, in part, because of her heart condition. After careful review and consideration of the evidence presented, it is the finding of this Court that the Respondent's assertions are without merit.

First, in regard to his mother's medical condition, Exhibit 2, Tab 8, Purcell Cardiology Outpatient Clinic, dated June 21, 2007 provides, in part, as follows:

> *History: This 36 year old Latin American female presents for evaluation of palpations that have been ongoing for the last year or so. She has occasional shortness of breath. She denied any chest pain. The patient speaks mainly Spanish. There was a translator present. She does not use any caffeine to speak of. No problems with high blood pressure.*
>
> *Review of Systems: Otherwise unremarkable.*
>
> *Physical Examination:*
>
> *General: Latin American female that is in no apparent distress. Vital Signs: BP: 124/70. Heart Rate: 80. WT 166 pounds. Lungs: Clear.*
>
> *Cardiac: No murmurs or bruits.*

Extremities: No cyanosis, clubbing, or edema.

EKG: Done recently showed some PVCs.

Plan: We will get a BMP. We will also get an echocardiogram. She will need to follow up with Dr. Heather Lynch in two weeks. We put her on atenolol 25 mg. a day. She is going to hold dose if the systolic BP is less than 100 or her heart rate is less than 50 beats per minute. If her symptoms do not get better with the use of atenolol then she probably needs to a get a Holter monitor done.

The attending physician for the above report was Dr. Alan R. Puls, M.D.

An Echocardiagram Report, dated June 26, 2007 (Exhibit 2, Tab 8), provides, in part, that Eva Cruz has a very irregular rhythm which appears to cause M.R to the Mitral Valve.

This Court notes that Eva Cruz provided in her testimony that sometimes her heart pounds, her arm becomes numb, she becomes agitated and can't work. She also testified that she had not missed a day of work due to her condition, and that the doctor allows her to work and drive to work on her own. This Court further notes that the Respondent testified that he thought his mother's main stress was caused because he did not get along with his father, and because of immigration difficulties.

It is the view of this Court that the evidence presented does not establish a serious health issue in regard to Ms. Cruz. However, even if Ms. Cruz suffered with a serious health issue, she has the support of her husband (Gregory Cruz), and sons, Cesar (age 19) and

Adrian (age 17) to assist and support her. In her own testimony, Ms. Cruz stated that she had a husband and three older children to assist her with her youngest children.

In regard to the support currently provided to Eva Cruz by her son, Luis, the Respondent, that support is primarily on weekends, which he alternates with this brother, Cesar, in taking care of his mother's youngest sons, Edwin and Anthony. The evidence reflects that others in the family also share in the care of the family's youngest children. It is to be noted that even when the Respondent assists in taking care of the younger children, those children must either be dropped off at his home, or his girl friend must borrow her parent's car in order for the Respondent to be able to pick the children up. As provided in the Record, the Respondent does not possess a driver's license.

Quite frankly, upon reviewing the evidence presented it is the finding of this Court that it is the Respondent who is dependent upon his mother for support, not his mother, the qualifying relative, who is dependent on him. More specifically, it is the Respondent's mother who provides him considerable financial support. In fact, the Respondent testified that his mother had made his last three rental payments as, due to excessive rain fall, he had not been able to mow lawns and work in landscaping. The Respondent's financial reliance on his mother was also indicated by his brother, Cesar, and by his girlfriend, Cindi Clark, who stated that his mother helped the Respondent when it was needed. Eva Cruz, in her own testimony, stated that she helps her son, Luis, when necessary, as that is something a mother should do. The evidence clearly supports a finding that it is

Eva Cruz, the mother, the qualifying relative, who is the source of strength in this family, and it is the Respondent who is dependent upon her, not she upon him.

This Court must further note, that the Respondent lives with his girl friend, Cindi Clark, who does not work. The Respondent testified that he did not want his wife to work because he was the man of the house. However, he does not apply that same standard to his mother, from whom he continues to receive financial and other support. The Respondent and his girl friend have only themselves to take care of, as his girl friend's child is being raised by her parents. The Respondent and his girl friend apparently must borrow her parent's car if they need to go somewhere. The point this Court is making is that it appears that this Respondent places a financial hardship on his mother and, additionally, by his own testimony he provided that he felt his mother's main stress was caused by his inability to get along with father and his current immigration problems.

The Respondent has strong family ties in the United States, including his mother and five siblings. By his own testimony he does not get along with his father, and he gets along with his step-father because he has to. In Mexico, the Respondent has two grandmas, aunts and uncles, and several cousins. Notably, one of his uncles is an agricultural engineer for the state, and one of his aunts is married to a chemical engineer. Many of his relatives reside in the Durango area. Apparently, there is a close relationship by the Respondent's family with their relatives in Mexico, as Eva Cruz and her family have returned to Mexico to visit them. Seemingly, these family ties in Mexico

would be of benefit to the Respondent upon removal to that country. Notably, the Respondent testified that his mother, Eva, could probably help him if he is deported to Mexico, but that he would hate asking her for money.

In regard to the Respondent's ability to work in Mexico, in this Court's view he has all the requisite skills and knowledge to succeed there. He has a carpenter's degree, he is a certified cabinet maker, he knows something about the electrical trades. And he is good at what he does, winning both state and national recognition for his skills.

The Respondent, in his application for relief, lists assets of approximately $10,000.00. Additionally, he, once again, stated that he thought that his mother could and would help him in Mexico if that was needed. As his mother currently helps him, seemingly, if necessary, she would also help him if he was in Mexico. Also, once again, he has family ties in Mexico that could help him get started.

Despite his assertions in regard to his ability to speak "correct" Spanish, Spanish is the language the Respondent first heard and spoke. It is the language his mother used when testifying at his hearing. It is the language she speaks at home. Although the Respondent states that he only speaks "slang" Spanish, seemingly, after speaking Spanish throughout the course of his life, particularly with his parents, this Respondent would be able to adequately communicate in Mexico.

In sum, we have a young, healthy, intelligent man, who has considerable work skills, is able to speak Spanish, has family ties in his native country, has

some assets and a mother who is devoted to assisting him wherever he is. It is the finding of this Court that this Respondent has all the requisite tools and circumstances necessary to succeed in his native land. His qualifying relative, his mother, Eva Cruz, is a young (age 36) very capable woman, who has a large family to support her with or without the Respondent. In fact, the evidence indicates that she is the strength of this family - still supporting in various ways her son, Luis, the Respondent. By her own testimony, her family support is broad, as she receives support from her husband and her two oldest sons. Accordingly, even if Eva Cruz's health condition is more severe than what was indicated in the Record, she has a large family from which to draw support, with or without the immediate presence of the Respondent.

Aggregate Effects of Hardships.

Individually and cumulatively, the above factors compel the Court to find that the "exceptional and extremely unusual hardship" standard has not been met, because the respondent's qualifying relatives would not suffer hardship that is "substantially beyond that which would ordinarily be expected to result from the respondent's deportation." Matter of Monreal, 23 I&N Dec. at 56.

V. CONCLUSION

For this reason the Court finds that the respondent has not met the hardship requirements for cancellation of removal. Accordingly, this Court will deny the Respondent's application for cancellation of removal.

VI. VOLUNTARY DEPARTURE

The Court may grant the discretionary relief of

voluntary departure at the conclusion of a proceeding under section 240B of the Act if it finds the following: (1) the alien has been physically present in the United States for at least one year immediately preceding the date on which the Notice to Appear was served; (2) the alien has been a person of good moral character for at least five years preceding his application for voluntary departure; (3) the alien is not deportable under sections 237(a)(2)(A)(iii) or 237(a)(4) of the Act; and, (4) the alien has established by clear and convincing evidence that he has the means to depart the United States and intends to do so. See INA, section 240B(b)(1).

Court's Finding: For the reasons stated above, this Court will grant the privilege of voluntary departure to the Respondent.

VII. ORDERS

IT IS ORDERED that the respondent's Application for Cancellation of Removal for Certain Nonpermanent Residents under INA section 240(b)(1) be and is **DENIED**.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure under INA section 240B be and is **GRANTED**.

The respondent is granted voluntary departure without expense to the government on or before January 15, 2008, or an extension beyond such date as may be granted by the District Director of the Department of Homeland Security, and under such conditions as the District Director may direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege

of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: the respondent shall be removed from the United States to Mexico on the charge contained in the Notice to Appear.

IT IS FURTHER ORDERED that the respondent shall post a voluntary departure bond in the minimum amount of $500 with the Immigration and Naturalization Service within five business days of issuance (mailing) of this order.

Warning to the Respondent: Failure to depart as required means that you could be removed . You may have to pay a civil penalty of US $1,000 to US $5,000 and you would become ineligible for voluntary departure, cancellation of removal, and any change or adjustment of status for ten years. If you fail to depart as required and then fail to comply with the removal order, you could also be fined US $500 for each day of non-compliance.

Appeal: This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision.

Date: **November 15, 2007.**

_____

Richard Randall Ozmun
Immigration Judge
US. DOJ. EOIR

APPENDIX D

Administrative Procedure Act Provisions

5 U.S.C. § 701, "Application; definitions," provides, in pertinent part:

> (a) This chapter [5 U.S.C. §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

5 U.S.C. § 702, "Right of review," provides, in pertinent part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Immigration and Naturalization Act Provisions

8 U.S.C. § 1229b(b), "Cancellation of removal and adjustment of status for certain nonpermanent residents," provides, in pertinent part:

> (1) In general. The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for

permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3) [8 U.S.C. §§ 1182(a)(2), 1227(a)(2), or 1227(a)(3)], subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1252(a) provides, in pertinent part:

(1) General orders of removal.

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 235(b)(1) [8 U.S.C. § 1225(b)(1)]) is governed only by chapter 158 of title 28 of

the United States Code [28 U.S.C. §§ 2341 et seq.], except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review.

* * *

(B) Denials of discretionary relief.

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, United States Code [28 U.S.C. § 2241], or any other habeas corpus provision, and sections 1361 and 1651 of such title [28 U.S.C. §§ 1361 and 1651], and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245 [8 U.S.C. §§ 1182(h), 1182(i), 1229b, 1229c, or 1255], or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this title [8 U.S.C. §§ 1151 et seq.] to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 208(a) [8 U.S.C. § 1158(a)].

* * *

(D) Judicial review of certain legal claims.

Nothing in subparagraph (B) or (C), or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

Provisions from the Code of Federal Regulations

8 C.F.R. § 1003.1(e), "Case management system," provides, in pertinent part:

The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three-member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized, acting alone, to adjudicate appeals as provided in this paragraph.

* * *

(3) Merits review.

In any case that has not been summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceedings and transcript, and the issuance of a briefing schedule. A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may sum-

marily dismiss an appeal after completion of the record of proceeding.

(4) Affirmance without opinion.

(i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case.

* * *

(5) Other decisions on the merits by single Board member.

If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision

is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) Panel decisions.

Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

(v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1003.1(e)(5).

No. 09-664

In the Supreme Court of the United States

LUIS ENRIQUE ARAMBULA-MEDINA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a court of appeals that lacks jurisdiction to consider a petition for judicial review challenging the merits of a final order of removal nonetheless has jurisdiction to review the Board of Immigration Appeals' intermediate procedural decision to resolve an administrative appeal by means of a single-member affirmance without opinion.

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In the Supreme Court of the United States

No. 09-664

LUIS ENRIQUE ARAMBULA-MEDINA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 572 F.3d 824. The orders of the Board of Immigration Appeals (Pet. App. 10-11) and the immigration judge (Pet. App. 12-44) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2009. On October 1, 2009, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including December 7, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. An alien who has been ordered removed from the United States by an immigration judge (IJ) may

appeal the IJ's order to the Board of Immigration Appeals (BIA or Board). See 8 C.F.R. 1003.1(b)(1)-(3), 1240.53(a). Before 1999, administrative appeals from the removal orders of IJs were heard by three-member panels of the Board. On October 18, 1999, however, the Attorney General adopted new regulations, which were further amended on August 26, 2002, to streamline the appellate process. See 64 Fed. Reg. 56,135 (1999); 67 Fed. Reg. 54,878 (2002).

Under the streamlining regulations, all appeals to the Board are assigned to a single Board member for screening and disposition "[u]nless a case meets the standards for assignment to a three-member panel under [8 C.F.R. 1003.1](e)(6)." 8 C.F.R. 1003.1(e). The Board member determines the existence of circumstances warranting assignment to a three-member panel —which include the "need to settle inconsistencies" among IJ rulings; establish precedents construing laws or regulations; and the need to resolve a case of national import, 8 C.F.R. 1003.1(e)(6)—after the transcript has been prepared and the appeal briefed. 8 C.F.R. 1003.1(e). If the Board member determines that the appeal does not warrant consideration by a three-member panel, the Board member next determines whether the appeal should be affirmed without opinion under 8 C.F.R. 1003.1(e)(4) or resolved via a brief single-member decision under 8 C.F.R. 1003.1(e)(5).

In particular, Section 1003.1(e)(4) provides that affirmance without opinion is appropriate if the case is "squarely controlled by existing Board or federal court precedent and do[es] not involve the application of precedent to a novel factual situation," or "[t]he factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion."

8 C.F.R. 1003.1(e)(4)(i)(A) and (B). When the BIA affirms without opinion, "an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Board's conclusion that any errors in the decision of the [IJ] or the Service were harmless or nonmaterial." 8 C.F.R. 1003.1(e)(4)(ii). The IJ's decision becomes the final agency determination, and the court of appeals reviews the IJ's decision as it would a decision of the BIA. See, *e.g.*, *Lanza* v. *Ashcroft*, 389 F.3d 917, 925 (9th Cir. 2004).

b. The impetus for the streamlining reform was an explosive increase in the Board's caseload. See 64 Fed. Reg. at 56,136. Between 1984 and 1998, the number of new appeals and motions before the Board increased from 3000 annually to 28,000 annually. *Ibid.* Faced with such a staggering increase, the Board's ability to accomplish its mission—"to provide fair and timely immigration adjudications and authoritative guidance and uniformity in the interpretation of the immigration laws"—had been compromised. *Ibid.* To ameliorate that problem, the Attorney General implemented the system of streamlined appellate review. The system is premised on the recognition that "in a significant number of appeals and motions filed with the Board, a single appellate adjudicator can reliably determine that the result reached by the adjudicator below is correct and should not be changed on appeal." *Id.* at 56,135. The result is a system that enables the Board to render decisions in a more timely manner, while husbanding its limited resources. See *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272, 280 (4th Cir. 2004) ("[T]he agency adopted regulations that would allow it to focus a greater measure of its resources on more complicated cases.").

2. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who is present in the United States without being admitted or paroled is removable. 8 U.S.C. 1182(a)(6)(A)(i). The Attorney General, in his discretion, may cancel an alien's removal if the alien meets certain eligibility requirements. 8 U.S.C. 1229b(b)(1). To be statutorily eligible for cancellation of removal, the alien must meet certain criteria, which include establishing good moral character, continuous physical presence in the United States for at least ten years, and "exceptional and extremely unusual hardship" resulting "to the alien's [United States citizen or lawful permanent resident] spouse, parent, or child." 8 U.S.C. 1229b(b)(1)(D). In addition to satisfying the three statutory eligibility requirements, an applicant for cancellation of removal must establish that he warrants such relief as a matter of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998).

b. The INA generally authorizes "[j]udicial review of a final order of removal." 8 U.S.C. 1252(a)(1). Since 1996, however, the INA has barred judicial review of certain discretionary decisions made by the Attorney General, 8 U.S.C. 1252(a)(2)(B), including the denial of an alien's request for cancellation of removal under Section 1229b, see 8 U.S.C. 1252(a)(2)(B)(i). See generally *Kucana* v. *Holder*, No. 08-911 (Jan. 20, 2010), slip op. 3 & n.2, 11, 12-13. In 2005, Congress qualified this jurisdictional bar by providing that Section 1252(a)(2)(B) does not preclude review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D).

2. Petitioner is a native and citizen of Mexico who illegally entered the United States at or near El Paso, Texas, on or about December 23, 1991. Pet. App. 2, 13. In October 2006, the Department of Homeland Security

(DHS) initiated removal proceedings against petitioner, charging him with removability under 8 U.S.C. 1182(a)(6)(A)(i), as an alien present in the United States without being admitted or paroled. Pet. App. 2, 13. Petitioner conceded that he is removable as charged, and sought relief in the form of cancellation of removal under 8 U.S.C. 1229b(b)(1). Pet. App. 2-3.

Petitioner's hearing on his application for cancellation of removal took place on August 23, 2007.[1] Pet. App. 4. On November 15, 2007, the IJ issued a written opinion denying petitioner's application. *Id.* at 12-44. Assessing the evidence of record under three precedential Board decisions explicating Section 1229b(b)(1)(D)'s requirement that petitioner establish that removal would result in "exceptional and extremely unusual hardship" to a qualifying relative, see *In re Monreal*, 23 I. & N. Dec. 56 (B.I.A. 2001), *In re Andazola*, 23 I. & N. Dec. 319 (B.I.A. 2002), and *In re Recinas*, 23 I. & N. Dec. 467 (B.I.A. 2002), the IJ concluded that petitioner had failed to establish that such hardship would result to his legal permanent resident mother. Pet. App. 31-42.

Petitioner appealed the IJ's decision to the Board, contending that the IJ erred in holding that his removal would not result in "exceptional and extremely unusual hardship" to his mother. Administrative Record 6-12 (A.R.). Petitioner further argued that the IJ failed to properly apply the Board's decisions in *Monreal, Andazola, and Recinas*. A.R. 12-16. On November 24, 2008, the Board affirmed the IJ's decision without opinion. Pet. App. 10-11.

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[1] The record in this case consists of testimony from petitioner and five witnesses, as well as numerous documents proffered to support petitioner's claim that he satisfied all of the statutory requirements for cancellation of removal. Administrative Record 65-381.

3. a. Petitioner filed a petition for judicial review of the Board's decision. Petitioner's primary contention was that the IJ's denial of cancellation of removal violated petitioner's right to due process because it was based on erroneous factual findings and the IJ incorrectly applied Board precedent. Pet. C.A. Br. 18-19. In addition, petitioner argued that his due process rights were violated because "the BIA summarily dismissed his appeal 'without commenting or otherwise addressing any of the identified issues.'" Pet. App. 7 (quoting Pet. C.A. Br. 16).

b. The court of appeals dismissed the petition for lack of jurisdiction under Section 1252(a)(2)(B)(i). The court first observed that its jurisdiction was limited to reviewing "constitutional claims and questions of law." Pet. App. 7 (citation and internal quotation marks omitted). Petitioner, the court noted, had accordingly attempted to frame his arguments as due process challenges to the IJ's decision. *Ibid.* The court rejected petitioner's due process arguments, holding that petitioner's right to due process was not violated because he lacked a "liberty or property interest in obtaining purely discretionary relief." *Id.* at 8 (quoting *Dave* v. *Ashcroft*, 363 F.3d 649, 653 (7th Cir. 2004)). The court concluded that "'because cancellation of removal is a form of discretionary relief,' petitioner '[could] not raise a due process challenge to [the] denial of his application for cancellation of removal.'" *Ibid.* (emphasis omitted) (quoting *Dave*, 363 F.3d at 653).

The court also stated that even if petitioner "could invoke due process," it was "not persuaded that any of the purported violations he has identified have merit." Pet. App. 8. Specifically, the court rejected petitioner's argument that the Board's affirmance without opinion

violated due process, observing that "the process employed by the [Board] in petitioner's case, i.e., of having a single member affirm, without opinion, the IJ's decision, is clearly authorized by regulation." *Id.* at 9 (citing 8 C.F.R. 1003.1(e)(4)). The court noted that "petitioner has failed to explain how this procedure could possibly give rise to a due process violation when * * * '[a]n alien has no constitutional right to any administrative appeal at all.'" *Ibid.* (brackets in original) (quoting *Yuk* v. *Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004)).

ARGUMENT

Petitioner argues that the court of appeals had jurisdiction to review whether the Board violated its own regulations in affirming petitioner's administrative appeal without an opinion under 8 C.F.R. 1003.1(e)(4). The Board's application of the streamlining regulations, petitioner contends, is not committed to agency discretion by law under the Administrative Procedure Act (APA), 5 U.S.C. 701(a)(2). Pet. 6-8. Petitioner did not raise this contention before the court of appeals, and the court did not address it. As a result, the conflicts among the courts of appeals that petitioner asserts are not implicated by this case. Further review is unwarranted.

1. a. The court of appeals correctly held that under 8 U.S.C. 1252(a)(2)(B)(i), it had no jurisdiction to review the BIA's denial of petitioner's application for cancellation of removal. Pet. App. 7 (citing 8 U.S.C. 1252(a)(2)(D)). The INA provides that "no court shall have jurisdiction to review * * * any judgment regarding the granting of relief" under Section 1229b, which governs cancellation of removal. 8 U.S.C. 1252(a)(2)(B)(i); see *Kucana* v. *Holder*, No. 08-911 (Jan. 20, 2010), slip op. 12-13.

The court of appeals also correctly found that petitioner could not avail himself of the statutory exception permitting federal-court review of "constitutional claims or questions of law." 8 U.S.C. 1252(a)(2)(D). Pet. App. 7. The court correctly rejected petitioner's attempt to recast as due process claims his challenges to the IJ's factual findings and his discretionary decision denial of discretionary relief, reasoning that petitioner had no entitlement to discretionary relief and therefore could not raise "a due process challenge to [the] denial of his application for cancellation of removal." *Id.* at 8 (brackets in original) (citing *Dave* v. *Ashcroft*, 363 F.3d 649, 652-653 (7th Cir. 2004)). In addition, as the court noted, *ibid.*, petitioner's primary arguments were simply challenges to the IJ's factual findings and its discretionary decision, and recasting such contentions as due process claims is "insufficient to give [the] Court jurisdiction under [Section] 1252(a)(2)(D)." *Id.* at 8-9 (citing *Jarbough* v. *Attorney Gen.*, 483 F.3d 184, 190 (3d Cir. 2007)).

b. The court of appeals also correctly rejected petitioner's argument that the BIA's affirmance without opinion under 8 C.F.R. 1003.1(e)(4) violated his due process rights. Neither the Constitution nor the INA imposes a requirement that appeals be affirmed by opinion or heard by multi-member panels. Aliens have no constitutional right to an administrative appeal of removal orders, and therefore no due process right to a particular procedure for considering appeals. Pet. App. 9 (citing *Yuk* v. *Ashcroft*, 355 F.3d 1222, 1229 (10th Cir. 2004)). Nor does the INA impose any requirements concerning the procedure for administrative appeals; it simply provides that an IJ shall inform an alien of the right to appeal the IJ's order of removal, 8 U.S.C. 1229a(c)(4),

and of the fact that the IJ's order of removal will become final if an appeal is not taken, 8 U.S.C. 1101(a)(47)(A) and (B).

In addition, this Court has made clear that "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." See *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978) (citation and internal quotation marks omitted). The government thus could, consistently with due process and the INA, provide that all appeals from orders of removal are to be adjudicated by a single member of the Board, as is the case in many other administrative schemes. See *Falcon Carriche* v. *Ashcroft*, 350 F.3d 845, 850 (9th Cir. 2003) (noting that even when the Board streamlines a case, the alien still has a right to a full and fair hearing before the IJ, as well as the opportunity to present his arguments to the Board for a decision by a Board member, and that the argument that aliens are "entitled to an additional procedural safeguard" has "no support in the law"); cf., *e.g.*, 7 C.F.R. 1.132, 1.145 (providing that decisions of administrative law judges are appealed to a single "judicial officer" acting for the Secretary of Agriculture).[2]

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[2] Although petitioner suggests (Pet. 28-29) that streamlining has particularly severe effects in cases like this one, in which the court of appeals has no jurisdiction to review the Board's final order, petitioner received an extensive hearing before the IJ and a full opportunity to brief his appeal before a member of the BIA. See *Falcon Carriche*, 350 F.3d at 845-850 (rejecting due process challenge to streamlining regulations in case in which the court had no jurisdiction to review decision denying cancellation of removal). In addition, the fact that the BIA member affirms without opinion does not suggest that the BIA member gave less than full and fair consideration to the issues raised. Cf.

The court of appeals' conclusion that the BIA's procedure for affirming certain appeals without opinion does not give rise to due process concerns is consistent with the decisions of all of the other courts of appeals to consider the issue. See *Falcon Carriche*, 350 F.3d at 845 (noting that affirmance without opinion pursuant to streamlining regulations does not impede court's ability to review IJ's findings and conclusions); see also, *e.g.*, *Zhang* v. *United States Dep't of Justice*, 362 F.3d 155, 157-158 (2d Cir. 2004) (noting that appellate courts regularly issue summary affirmances); *Blanco de Belbruno* v. *Ashcroft*, 362 F.3d 272 (4th Cir. 2004); *Albathani* v. *INS*, 318 F.3d 365, 375-378 (1st Cir. 2003); *Dia* v. *Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (en banc); *Soadjede* v. *Ashcroft*, 324 F.3d 830, 832 (5th Cir. 2003) (per curiam); *Denko* v. *INS*, 351 F.3d 717 (6th Cir. 2003); *Georgis* v. *Ashcroft*, 328 F.3d 962 (7th Cir. 2003); *Loulou* v. *Ashcroft*, 354 F.3d 706, 708-709 (8th Cir. 2003), cert. denied, 543 U.S. 487 (2004); *Mendoza* v. *United States Att'y Gen.*, 327 F.3d 1283 (11th Cir. 2003).

2. Petitioner's sole contention before this Court (Pet. i, 31-36) is that, notwithstanding the court of appeals' holding that it lacked jurisdiction under Section 1252(a)(2)(B)(i) to review petitioner's challenges to the BIA's final order, the court had jurisdiction to review the Board's antecedent procedural ruling that petitioner's administrative appeal should be affirmed without opinion, rather than processed under one of the other procedures set forth in the streamlining regulations. Petitioner argues that the court had jurisdiction to review the BIA's compliance with 8 C.F.R.

Furman v. *United States*, 720 F.2d 263, 265 (2d Cir. 1983) (per curiam) (considering summary orders by the court of appeals).

1003.1(e)(4) because it is a question of law under Section 1252(a)(2)(D), and the APA provides jurisdiction to review agency actions that are not "committed to agency discretion by law," 5 U.S.C. 701(a)(2).

Petitioner did not raise this argument below, see Pet. C.A. Br. 4-6, 34-42, and the court of appeals did not address it. Rather, the court held only that it had no jurisdiction over petitioner's general challenge to the merits of the IJ's final order denying cancellation of removal under Section 1252(a)(2)(B)(i). This Court thus has no decision before it to review on the issue petitioner seeks to raise, and it should decline to consider petitioner's contentions in the first instance. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (this Court ordinarily does not consider questions not pressed or passed upon below); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

In addition, because the court of appeals did not address whether it had jurisdiction to review the BIA's application of the criteria set forth in 8 C.F.R. 1003.1(e)(4), the asserted circuit conflict that petitioner identifies is not implicated by this case. All of the decisions that petitioner describes as creating a circuit conflict addressed the question whether, when the court had jurisdiction to review the alien's challenges to the BIA's final removal order, the court also had jurisdiction to review the BIA's decision that the administrative appeal should be processed under 8 C.F.R. 1003.1(e)(4)—rather than under any of the other procedures set forth in the streamlining regulation—or whether the streamlining decision was committed to agency discretion under the APA, 5 U.S.C. 701(a)(2), and therefore unreviewable. See, *e.g.*, *Smriko* v. *Ashcroft*, 387 F.3d 279, 294-296 (3d Cir. 2004) (where court had jurisdiction over final

BIA order, holding that review of BIA's decision that streamlining was appropriate was available under the APA); *Chong Shin Chen* v. *Ashcroft*, 378 F.3d 1081, 1088 (9th Cir. 2004) (holding that court could review propriety of decision to affirm without opinion where that decision was based on the conclusion that no novel legal issue was raised); *Haoud* v. *Ashcroft*, 350 F.3d 201, 205 (1st Cir. 2003) (suggesting that BIA's decision that petitioner's case was appropriate for streamlining was not committed to agency discretion; remanding for explanation when affirmance without opinion made it impossible to discern whether BIA's removal order rested on a ground reviewable under the INA); *Kambolli* v. *Gonzales*, 449 F.3d 454, 458 (2d Cir. 2006) (stating, after concluding that alien's asylum claims were meritless, that streamlining decision was unreviewable because it is committed to agency discretion); *Ngure* v. *Ashcroft*, 367 F.3d 975, 983 (8th Cir. 2004) (in asylum case, stating that in certain circumstances, decision to streamline "a particular case is committed to agency discretion and not subject to judicial review"); *Tsegay* v. *Ashcroft*, 386 F.3d 1347, 1355-1356 (10th Cir. 2004) (holding, in asylum case, that streamlining decision is committed to agency discretion).[3]

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[3] In three of the decisions on which petitioner relies, the court did not decide whether a decision that an appeal should be resolved under 8 C.F.R. 1003.1(e)(4) was reviewable. See *Zhu* v. *Ashcroft*, 382 F.3d 521 (5th Cir. 2004) (remanding to BIA because court could not discern whether BIA's decision rested on a reviewable basis, without deciding whether application of streamlining was reviewable); *Denko*, 351 F.3d at 732 (assuming without deciding that streamlining decision was reviewable because that question did not matter to outcome); *Georgis*, 328 F.3d 967 (declining to decide issue because it made no practical difference and court could review IJ's denial of asylum).

The decision below, in contrast, rests solely on the ground that the court lacked jurisdiction over petitioner's challenges to the BIA's discretionary decision to deny cancellation of removal under Section 1252(a)(2)(B)(i). It does not address the question of a court of appeals' jurisdiction to review a single Board member's decision to streamline a case. Therefore, even if that issue otherwise warranted review by this Court, this case would not provide a vehicle in which to do so.[4]

3. In any event, petitioner's argument that the court of appeals had jurisdiction to review the Board's compliance with the streamlining regulations does not have merit.

a. Contrary to petitioner's argument (Pet. 33-36), the Board's application of the streamlining regulations is committed to agency discretion by law. 5 U.S.C. 701(a)(2). Regulations that govern the "agency's decision about how to allocate its scarce resources to accomplish its complex mission," rather than creating individual rights or entitlements, are "traditionally * * * free from judicial supervision." *Ngure*, 367 F.3d at 983. The streamlining regulations fall into this category: they are directed to the agency's internal administration and are designed to assist the agency in carrying out its functions, *American Farm Lines* v. *Black Ball Freight*

[4] Petitioner also argues (Pet. 19-23) that this Court should grant review in order to provide guidance regarding an asserted circuit conflict concerning whether courts of appeals may review a single BIA member's refusal to refer an appeal to a three-judge panel under 8 C.F.R. 1003.1(e)(6). Petitioner did not raise before the court of appeals any challenge to the BIA's compliance with its regulations in deciding not to refer his appeal to a three-member panel, see Pet. C.A. Br. 16 (stating that referral to a panel is "within the sole jurisdiction of the Board"), and therefore this contention does not merit review.

Serv., 397 U.S. 532, 539 (1970); they are not intended to confer procedural or substantive rights on individuals, see 64 Fed. Reg. at 56,138 (regulations will "allow the Board to manage its caseload"). Indeed, the regulations provide that when the Board utilizes the affirmance-without-opinion procedure, "for purposes of judicial review * * * the [IJ's] decision becomes the decision reviewed." *Ibid.* The Attorney General's view that the streamlining regulations create no judicially enforceable rights is "controlling," as it is neither "plainly erroneous [n]or inconsistent with the regulation." *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997) (citation omitted).

In addition, the Board's decision to apply the affirmance-without-opinion procedure to a particular case is not susceptible to a "meaningful and adequate standard of review," *Ngure*, 367 F.3d at 985, because determining whether the appeal is governed by Board precedent or presents substantial legal issues, see 8 C.F.R. 1003.1(e)(4), would necessarily implicate review of the merits of the Board's denial of relief. See *ICC* v. *Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 279 (1987) (ICC's decision not to reopen a prior action on grounds of material error would merge with review of the merits and was therefore not independently reviewable).

Finally, a Board member's decision that a particular case presents a sufficiently "substantial" issue to warrant a written opinion, 8 C.F.R. 1003.1(e)(4)(i)(B), rests on the Board member's knowledge about the Board's limited resources, and her expertise as to whether a published decision in a particular case, rather than in other cases presenting the same issue, would advance the administration of the immigration system and the development of the law. See *Ngure*, 367 F.3d at 986.

The determination to affirm without opinion is therefore committed to agency discretion by law. 5 U.S.C. 701(a)(2).

b. Even if petitioner were correct that the BIA's application of 8 C.F.R. 1103.1(e)(4) is not committed to agency discretion, the court of appeals would have lacked jurisdiction to review the BIA's streamlining decision for an independent reason.

The APA restricts judicial review to "final agency action," 5 U.S.C. 704, and the BIA's decision to adjudicate petitioner's administrative appeal under 8 C.F.R. 1003.1(e)(4) was an interlocutory procedural decision. Although the APA provides that a procedural agency action or ruling "is subject to review on the review of the final agency action," 5 U.S.C. 704, here the INA expressly deprived the court of appeals of jurisdiction to review the final agency action. See 8 U.S.C. 1252(a)(2)(B)(i). Because the court held that it lacked jurisdiction to review petitioner's challenges to the final agency decision in this case, it also would have lacked jurisdiction to review the intermediate procedural decision concerning streamlining that preceded the final order. See *Falcon Carriche*, 350 F.3d at 854 ("Because we lack jurisdiction to review the merits of [the alien's challenge to] the IJ's discretionary decision regarding * * * cancellation of removal[,] * * * we are also without jurisdiction to evaluate whether streamlining was appropriate.").

Petitioner contends (Pet. 33) that he may invoke Section 1252(a)(2)(D)'s exception to the jurisdictional bar to raise a legal challenge to the procedural decision under 8 C.F.R. 1003.1(e)(4), even though the court lacks jurisdiction over petitioner's challenges to the Board's final action. But reviewing the Board's compliance with the

criteria set forth in 8 C.F.R. 1003.1(e)(4)—for instance, whether the issue is governed by BIA precedent and does not raise substantial factual issues, 8 C.F.R. 1003.1(e)(4)—would essentially require the court to review the merits of the IJ's discretionary decision to deny cancellation of removal. That is precisely what Congress precluded in Section 1252(a)(2)(B)(i). See *Falcon Carriche*, 350 F.3d at 853-854.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2010

Supreme Court, U.S.
FILED
MAR 24 2010
OFFICE OF THE CLERK

No. 09-664

In the Supreme Court of the United States

LUIS ENRIQUE ARAMBULA-MEDINA,
Petitioner,

v.

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The most telling aspect of the government's brief in opposition is that which it does *not* oppose. Nowhere does the government contest that the courts of appeals are divided about whether they have jurisdiction to review decisions by the Board of Immigration Appeal ("BIA") to "streamline" certain cases for single-member review under 8 C.F.R. §§ 1003.1(e)(4)–(6). Nor does the government respond to the systemic problems created by this streamlining system, including that streamlining has overwhelmed the courts of appeals with immigration appeals. *See* Pet. at 24–31. Rather, the government's opposition focuses on two arguments: (1) that the instant case presents a poor vehicle for this Court's resolution of that conflict, and (2) that this Court's intervention is not warranted because, on the merits, streamlining decisions should be unreviewable. Neither premise is correct. This Court should therefore grant the petition for writ of certiorari.

I. The Instant Case Presents An Ideal Vehicle Through Which This Court Can Review An Undisputed Circuit Split.

1. The government argues that Petitioner failed to raise below the question of whether the Tenth Circuit had jurisdiction to review the BIA's streamlining decision in his case—a curious position, given the detailed briefing on the subject before the Tenth Circuit. In his opening brief below, Petitioner argued repeatedly that the BIA erred in resolving his appeal through a single-member affirmance without opinion ("AWO"). *See, e.g.*, Pet. C.A. Br. at 36

("Again, [prior precedent] did not provide for 'Affirmance without Opinion' by the single Board panel member under the criteria identified in 8 C.F.R. 1003.1(a)(7)(ii)."); *see also* Pet. at 5. In response, the government below devoted several pages of its response brief to the argument that the Tenth Circuit lacked jurisdiction to review the AWO procedures because the court lacked jurisdiction over the merits of Petitioner's immigration appeal. See Gov't C.A. Br. at 16–19. In making this argument, the government cited much of the authority it now references in its opposition before this Court, including 8 U.S.C. § 1252's removal of appellate jurisdiction over discretionary BIA decisions and *Tsegay v. Ashcroft*, 386 F.3d 1347 (10th Cir. 2004). *See* Gov't C.A. Br. at 17. In reply, Petitioner pointed to § 1252(a)(2)(D)'s exception for constitutional and other legal challenges, just as he does before this Court. *See* Pet. C.A. Reply Br. at 2.

As petitioner has already explained, the arguments advanced by the government and accepted by the Tenth Circuit below are one side of an acknowledged circuit split—a split implicated by the government's arguments below, and the very split Petitioner now asks this Court to resolve. Pet. at 8–19. It is disingenuous for the government now to suggest the issue was never raised below, after it specifically briefed the issue before the lower court in response to Petitioner's arguments that the BIA erred in resolving his appeal through an affirmance without opinion. That Petitioner did not anticipatorily raise the jurisdictional question in his opening brief below is irrelevant—he challenged the BIA's streamlining decision, the government objected that

courts of appeals lacked jurisdiction over streamlining issues, and the issue was submitted to the Tenth Circuit.

Given that the jurisdictional question was raised below, it is of no importance that the Tenth Circuit's decision below does not discuss the subject in great detail. As long as an issue is pressed below, review in this Court is appropriate, even if the court of appeals fails to pass upon the issue. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (grant of certiorari is precluded "only when 'the question presented was not pressed or passed upon below.'").

Nor does the brevity of the Tenth Circuit's opinion provide any practical barrier to this Court's review of the question presented. Although the Tenth Circuit focused its opinion on due-process guarantees rather than upon the jurisdictional precedent discussed in the petition, it nevertheless did address the streamlining issue through its holding that streamlining is permitted by regulation and consistent with the Constitution. *See* Pet. App. 9a. Although not discussed in the decision below, the contours of the circuit split regarding streamlining jurisdiction are well defined elsewhere, as they have been articulated in detail throughout the opinions of at least nine circuits. *See* Pet. at 8–19. Having already spoken clearly to the issue in *Batalova* and *Tsegay*, the Tenth Circuit did not need to repeat its analysis in Petitioner's case as well. Rather, the decision below and the briefing which led to it provide this Court with all the basis it needs to use Petitioner's case to finally and fairly resolve the question presented.

2. As Petitioner anticipated, the government has adopted a narrow view of the circuit split in a further effort to evade review. *Compare* Br. in Opp. at 11–13 *with* Pet. at 17–19. To do so, the government strives to assign legal significance to a mere coincidence—the fact that each circuit that has held it has jurisdiction to review streamlining decisions has done so in a case where the court also possessed jurisdiction over some other issue arising out of the merits of the BIA's decision. But nothing in the relevant opinions supports the distinction the government has attempted to draw.

As explained in the petition, not one of the circuits that have categorically asserted jurisdiction to review streamlining regulations has suggested this question is influenced by the presence or absence of jurisdiction over the underlying merits of an appeal. Pet. at 9–12; 17–19. Rather, the five circuits that have held they have jurisdiction to review immigration streamlining regulations have done so because application of the streamlining regulations is *not* "committed to agency discretion" under the Administrative Procedure Act. *See Smriko v. Ashcroft*, 387 F.3d 279 (3d Cir. 2004); *Zhu v. Ashcroft*, 382 F.3d 521 (5th Cir. 2004); *Haoud v. Ashcroft*, 350 F.3d 201 (1st Cir. 2003); *Denko v. INS*, 351 F.3d 717, 731–732 (6th Cir. 2003); *Georgis v. Ashcroft*, 328 F.3d 962, 967 (7th Cir. 2003).

For example, in *Smriko*, the Third Circuit held that "the issues addressed by single BIA members under § 1003.1(e)(4)(i) of the streamlining regulations are not committed to agency discretion and that the resolutions of those issues are judicially reviewable." *Smriko*, 387 F.3d at 294. In the same

opinion, the *Smriko* Court also reviewed a merits question—whether the Appellant had been convicted of a crime of moral turpitude. But the court discussed the merits issue only after first fully addressing the streamlining-jurisdiction issue. The Third Circuit never suggested the merits inquiry was in any way relevant in determining whether the court had jurisdiction to review the Board's streamlining procedures. Rather, the court's jurisdictional conclusion was rooted solely in the APA's standard for judicial review of an agency's procedural determinations—a standard that in no way relates to the merits of Petitioner's appeal. The same is true of the other leading cases supporting appellate review of streamlining decisions.

Challenges to the BIA's application of the streamlining regulations arise in all sorts of immigration-related appeals. In some of these cases, the courts of appeals also possess jurisdiction to review some other challenged aspect of the BIA's final decision. In others, they do not. But in each case, the streamlining question is the same: Whether judicial review of the application of the streamlining regulations is available under the APA, or is barred because the decision is committed to agency discretion. Thus, this case is the ideal vehicle for this Court to resolve the longstanding, intractable, and undisputed circuit split regarding the availability of streamlining jurisdiction.

II. The Government's Incorrect Merits Arguments Provide No Sound Reason For Denying Review.

With these procedural objections resolved, the government's only remaining argument is that this Court should deny review because, in the government's view, the Tenth Circuit was correct. Although the government makes this claim in a variety of ways, the arguments reduce to two contentions: (1) that judicial review of Petitioner's streamlining determination was statutorily barred by 8 U.S.C. § 1252(a)(2)(B)(i), and (2) that streamlining determinations are committed to agency discretion by law. Petitioner anticipated both of these arguments and addressed them in detail in Part IV of his petition, which explained both that (1) no statute, including § 1252(a)(2)(B), purports to eliminate judicial review of streamlining determinations, and (2) the regulations establish a meaningful legal framework that constrains agency decision-making in a way susceptible to judicial review. *See* Pet. at 31–36. As a result, only a short response to each contention is warranted.

1. The government argues that courts lack jurisdiction to review the AWO procedures because 8 U.S.C. § 1252(a)(2)(B)(i) "expressly deprived the court of appeals of jurisdiction to review the final agency action." Br. in Opp. at 15. Although the APA provides that judicial review of agency action can be barred by statute, here the government misinterprets the text of 8 U.S.C. § 1252.

The government's principal claim is that, because § 1252 deprives courts of appeals of the juris-

diction to review discretionary cancellation-of-removal decisions, the statute deprives the courts of appeals of jurisdiction to review any issues arising out of such cancellation proceedings. Br. in Opp. at 15. But a statutory bar on reviewing *certain questions* arising out of a final agency action does not somehow mean that no final action exists. Rather, as Petitioner has already explained, § 1252(a)(2)(D) preserves judicial review over "constitutional claims or questions of law" arising out of cancellation proceedings—questions that are judicially reviewable upon the BIA's resolution of an immigrant's administrative appeal. Pet. at 32–33. Section 1252(a)(2)(B) is therefore not a bar to *all* questions arising out of final agency actions on immigration appeals, but only bars review of specific discretionary decisions such as whether a petitioner qualifies for cancellation of review.

The crux of Petitioner's argument is that streamlining decisions are "questions of law," and that judicial review of such legal questions falls comfortably within § 1252(a)(2)(D)'s preservation clause. The government therefore cannot evade review by claiming that operation of § 1252 somehow bars review of any and all issues arising out of the BIA's final agency action. Rather, the BIA's affirmance without opinion represented the agency's final action with respect to Petitioner's cancellation petition, and legal questions arising out of that petition are judicially reviewable under § 1252(a)(2)(D). The decision to streamline, as an antecedent legal question, merges with this final action for purposes of review. *See* 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not

directly reviewable is subject to review on the review of the final agency action."); *Smriko*, 387 F.3d at 291 ("[R]eview of a final agency action, generally speaking, encompasses all of a petitioner's contentions of legal error by the agency at any stage of the agency's proceedings.").

The government's only response to this argument is a protest that review of streamlining decisions would somehow constitute an end-run around § 1252(a)(2)(B)'s ban on review of merits of the BIA's discretionary decision whether or not to grant a cancellation of removal. *See* Br. in Opp. at 15–16. But, as the circuit courts have recognized, many of the streamlining factors raise legal questions distinct from the merits of an immigration appeal. *See, e.g.*, *Smriko*, 387 F.3d at 292 ("[T]hese criteria present 'the kinds of issues [courts] routinely consider in reviewing cases.'" (citation omitted)). Just as an appellate court in a criminal case can review challenges to evidentiary rulings or the quality of counsel's representation without intruding into the merits of the jury's verdict, courts may consider streamlining determinations without delving into the merits of a cancellation-of-removal appeal. *Cf. id.* at 297 (remanding improperly streamlined case for full-panel BIA review "rather than usurping the role of the BIA and establishing a precedent that the Board's experience might counsel against").

Thus, nothing in § 1252(a)(2)(B) prevents courts of appeals from reviewing streamlining determinations. Rather, the statute provides an express carve-out for appellate review of legal issues such as whether the BIA correctly applied the streamlining regulations—an issue appellate courts can review

without intruding upon the BIA's protected role as the arbiter of the discretionary merits of cancellation-of-removal petitions. *See* 8 U.S.C. § 1252(a)(2)(D).

2. Finally, the government insists it is settled law that "the Board's application of streamlining regulations is committed to agency regulations by law," that application of affirmance-without-opinion procedures is "not susceptible to a 'meaningful and adequate standard of review,'" and that a Board member's decision regarding whether an opinion is substantial enough to warrant a written opinion falls within agency discretion. *See* Br. in Opp. at 13–15. Petitioner has already explained, however, how the streamlining regulations set forth meaningful legal standards that are susceptible to judicial review—a position supported both by this Court's precedent and the views of several circuits. *See* Pet. at 9–12, 33–36. Here, where no statute "purports to commit streamlining decisions to agency discretion by law, or to establish standards unsusceptible to judicial review," judicial review is available under the APA. See *Quinteros-Mendoza v. Holder*, 556 F.3d 159, 162 (4th Cir. 2009).

The government's argument to the contrary is simply a recapitulation of the positions the Eighth Circuit expressed in *Ngure v. Ashcroft*, 367 F.3d 975 (8th Cir. 2004). See Br. in Opp. at 13–15. Each of the *Ngure* Court's positions was addressed and disputed by the Third Circuit in *Smriko*. *See* 387 F.3d at 293, 294, 296. Although the government is free to take a side in the circuit split on these issues, such an approach merely proves the existence of the split at issue.

Without question, Petitioner and the government disagree about the merits of the question presented. But this is no reason to deny review. Rather, given the undisputed division among the circuits, this Court's intervention is required.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

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